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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

[SECOND DIVISION],

FROM AND INCLUDING DECISIONS OF MARCH 19, 1889, TO
DECISIONS OF OCTOBER 8, 1889.

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,
STATE REPORTER.

VOLUME CXIV.

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[SECOND DIVISION.]

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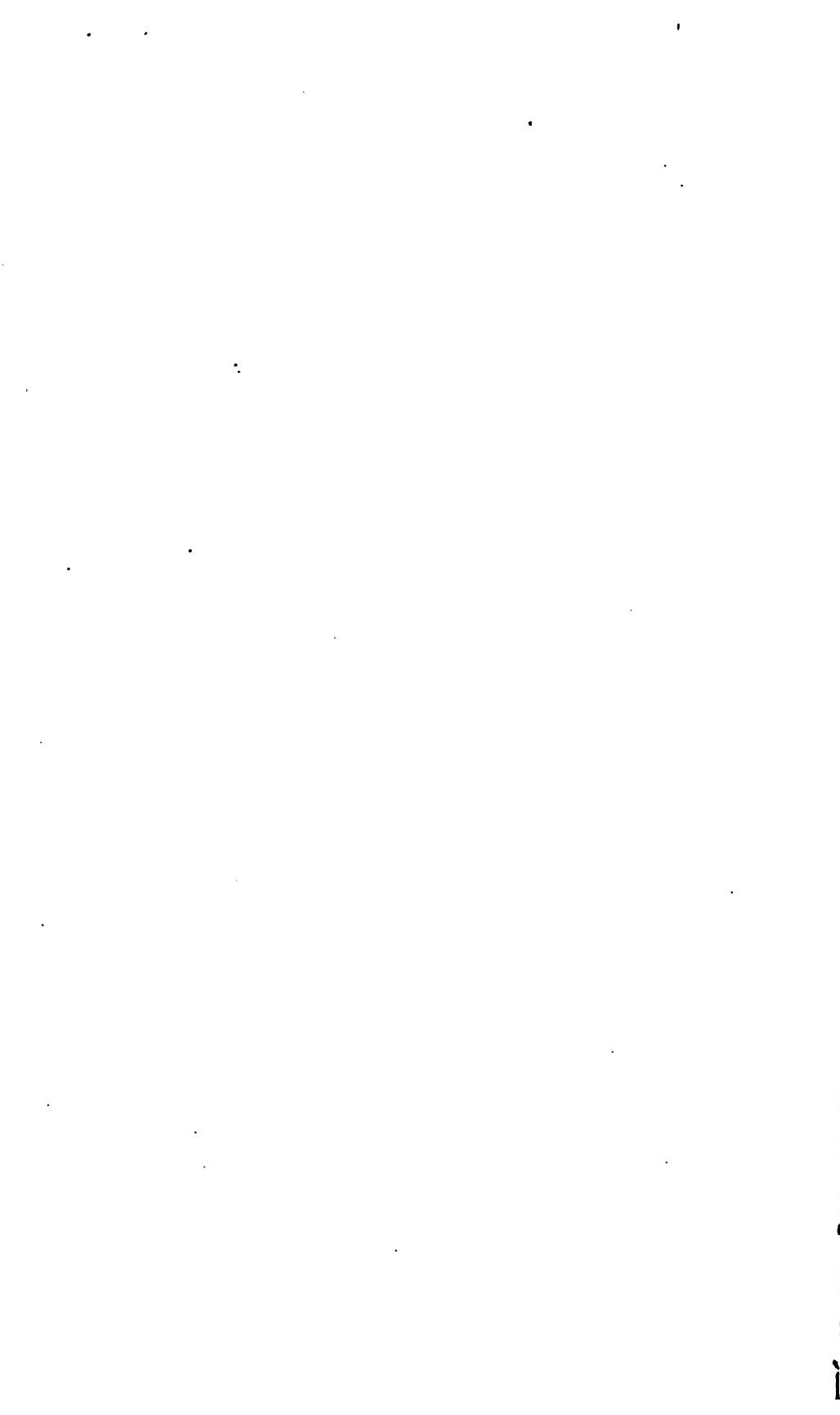


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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
[SECOND DIVISION].

Commencing March 19, 1889.

HENRY PATTON, as Assignee, etc., Appellant, v. THE ROYAL
BAKING POWDER COMPANY, Respondent.

One H. entered into a contract with defendant to furnish the latter all the boxes of a character specified it might require for one year from January first, at prices named; in case of failure it was provided that defendant might purchase the boxes it required in open market without notice, and charge H. with the excess over the contract-prices. On September 8, 1885, H. made a general assignment to plaintiff for the benefit of creditors; he claimed the right and continued to supply the boxes required until October fifth, when he informed defendant that he would be unable to fill further orders until an arrangement should be made of his affairs. Defendant thereupon contracted with another party to furnish the boxes required at prices in excess of those under the contract with H. Afterwards, at plaintiff's request, defendant permitted him to deliver such further boxes as should be made from lumber already cut for the purpose. In an action to recover for the boxes delivered subsequent to the assignment defendant set up, and was allowed, as a counter-claim, damages for non-performance of the H. contract. *Held*, no error; that while plaintiff had no power to proceed in the performance of the contract without the consent of those beneficially interested in the trust or the direction of the court, having adopted and proceeded to perform it, defendant's damages were available to him as a counter-claim.

Reported below, 45 Hun, 248.

(Argued March 5, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order
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Statement of case.

made July 1, 1887, which affirmed a judgment in favor of defendant, entered on a verdict.

The nature of the action and the facts are sufficiently stated in the opinion.

Joseph A. Burr for appellant. The counter-claim of the defendant cannot be sustained as either a counter-claim or set-off against the assigned estate, as it was not a debt at the time of the assignment. (*In re Adams*, 15 Abb. N. C. 61; *Frick v. White*, 57 N. Y. 103.) The claim is a claim in favor of plaintiff as an individual and not as representing the assigned estate. (*Thompson v. Whitemarsh*, 100 N. Y. 35; *Rathbone v. Hoovey*, 58 id. 463; *In re Adams*, 15 Abb. N. C. 71.) The claim of the defendant cannot be sustained as either a counter-claim or set-off against plaintiff as an individual. (*Lawrence v. Fox*, 20 N. Y. 268.) A promise by one party to do that which he is already under a legal obligation to perform is insufficient as a consideration to support a contract. (*Seyboldt v. L. E. R. R. Co.*, 95 N. Y. 562; *Vanderbilt v. Schreyer*, 91 id. 392.) In any event the defendant can only recover its damages for the interval between the fifth of October, when Mr. Patton gave notice that temporarily he could not fill defendant's orders, and the tenth of October, when he tendered performance of the contract. (*Dung v. Parker*, 52 N. Y. 464; *O'Neil v. N. Y. C. R. R. Co.*, 60 id. 138; *Marie v. Garrison*, 13 Abb. N. C. 259, 263; *Gundlich v. Hensler*, 23 Week. Dig. 145.)

John M. Bowers for respondent. The plaintiff could, if he so elected, accept the contract and avail of its benefits, and become responsible for its penalties. (*Van Dine v. Willett*, 24 How. Pr. 206; *Journeay v. Brackley*, 1 Hilt. 454; *Gibson v. Carruthers*, 8 M. & W. 321-333; *Boorman v. Nash*, 9 B. & C. 152.) There being a square conflict of evidence, the verdict of the jury will not be disturbed by this court, especially as the learned trial judge, who had full opportunity to see and hear the witnesses, and determine their relative

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credibility, refused, upon a motion for a new trial on his minutes, to interfere with their verdict. (*Beckwith v. N. Y. C. R. R. Co.*, 64 Barb. 299; *Jenks v. Van Brunt*, 6 Civ. Pro. R. 158; *Baird v. Mayor, etc.*, 96 N. Y. 567; *Crane v. Baudouine*, 55 id. 256; *Sherwood v. Hansen*, 94 id. 626.) There was sufficient evidence of the plaintiff's personal adoption of the contract upon which the jury could properly proceed to find a verdict in the defendant's favor. (*People v. M. T. Co.*, 11 Abb. N. C. 304; *Colt v. S. A. R. R. Co.*, 49 N. Y. 671; *Fairfax v. N. Y. C. R. R. Co.*, 40 Super. Ct. 128; *U. S. R. Co. v. Rushton*, 7 Daly, 410.) The plaintiff cannot urge that the verdict was against the weight of evidence, because he failed to request the court to direct a verdict in his favor. (*Sickles v. Gillies*, 45 How. Pr. 94, 96; *Hamilton v. Third S. A. R. R. Co.*, 13 Abb. Pr. [N. S.] 318.) A defendant is not bound to take advantage of the statute of frauds, or other technical claims of that character. (*Brown on Frauds*, § 135; *Cahill v. Bigelow*, 18 Pick. 369; *Waters v. Towers*, 8 W. H. & G. 401; *Sneed v. Bradley*, 4 Sneed [Tenn.], 401.) The defense was properly pleaded both as an offset and counter-claim. It was good either way. (*Dunham v. Benedict*, 120 U. S. 630-648.)

BRADLEY, J. The action was brought to recover for a quantity of packing boxes alleged to have been sold and delivered by the plaintiff to the defendant. The defendant alleged that the boxes were delivered pursuant to a contract which it had made with Oscar F. Hawley, and that after the assignment, hereinafter mentioned, to the plaintiff, the latter demanded that the defendant should accept of him the performance of the contract, and proceeded to perform it, to which the defendant assented and received from the plaintiff the boxes delivered by him in that behalf. It appeared that Hawley made, with the defendant, an agreement to furnish to the latter all the boxes, of the character specified, which it might require for one year from the 1st day of January, 1885, at prices therein mentioned, payable monthly; and it was also provided that if Hawley failed to furnish the boxes required

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by the defendant, the latter might supply its wants in that respect by purchase in the open market, without notice, and charge Hawley with the excess of the cost of those so purchased over such contract prices. So far as appears, Hawley was not in default up to September 8, 1885, when he, for the benefit of creditors, made a general assignment to the plaintiff, who thereafter, until the fifth day of October following, continued to supply the defendant with boxes. On that day the plaintiff informed the defendant that he would be unable to fill any further orders for the present, and until an arrangement should be made of his affairs. Thereupon the defendant negotiated an agreement with another party to furnish the boxes required, at stipulated prices somewhat in excess of those of the Hawley contract, but afterwards, at the request of the plaintiff, the latter was by the defendant permitted to deliver to it such further quantity of boxes as should be made from his lumber already cut for the purpose. The boxes delivered to the defendant by the plaintiff subsequent to the assignment to him, constitute the subject of his claim in this action. The defendant alleged non-performance of the Hawley contract, and as the consequence that damages for its breach were sustained by the defendant equal in amount to the difference between the prices therein stipulated and the cost of the boxes purchased elsewhere to supply the deficiency. The question presented is whether such claim for damages could be made available by way of counter-claim in this action.

The conclusion was, upon the evidence, warranted that the boxes which the plaintiff furnished to the defendant, prior to the fifth day of October, were delivered by him upon and in performance of the contract, and that there was a breach in the failure to completely perform it, resulting in damages to the defendant. While this Hawley contract passed by the assignment to the plaintiff, the latter, as such trustee, had no power to proceed to perform it without the consent of those beneficially interested in the trust or, perhaps, the direction of the court. Whatever he did in proceeding to furnish boxes to the defendant must, for the purposes of this action, be

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treated as a transaction by him individually. (*Thompson v. Whitmarsh*, 100 N. Y. 35; *Buckland v. Gallup*, 105 id. 453.) And the cause of action for the claim alleged in that behalf was his personally, and not as assignee. It is, therefore, contended, on the part of the plaintiff, that as against him the damages for the breach of the contract cannot be successfully alleged for any purpose unless it appear that he, upon some consideration, adopted the contract, and, as between the defendant and him, undertook to perform it, and that there was no such undertaking on his part or any consideration for its support. The question whether the plaintiff had adopted the contract and undertaken to perform it was submitted to the jury, and they found with the defendant, and the breach and the damages and their amount resulting from it were also found against the plaintiff by the verdict, and the amount of them was allowed by way of recoupment or abatement of the plaintiff's claim. The obligation originally rested upon Hawley to perform the contract, and he was subject to liability for damages on failure to do so. After the assignment to the plaintiff, the latter proceeded in the performance of the contract and partially performed it. There was some evidence given on the trial tending to prove that shortly after he had taken the assignment, the plaintiff had the purpose, of which he advised the defendant, of performing the contract, and that, as between him and the defendant, he adopted it and undertook its performance. The mutual understanding between those parties in that respect, inferable from the evidence, in view of the relation to the contract assumed by the plaintiff, permitted the conclusion that the plaintiff had effectually undertaken to perform it. The question of the weight of evidence upon the subject was disposed of by the court below, and is not here for consideration. These views lead to the conclusion that the damages resulting from breach of the contract constituted a counter-claim for the purposes of this action, available to the defendant. The breach of the contract occurred on the fifth of October, when the plaintiff advised the defendant of his inability to proceed further at that time with per-

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formance of the contract, and by such information it was left indefinitely when, if at any time, he would resume or continue the delivery of boxes to the defendant. The latter was at liberty then to provide itself with other means of obtaining its supply.

The availability of the exceptions bearing upon the question of damages is dependent upon the conclusion that no claim for any amount was allowable to the defendant.

The conclusion was warranted that the boxes furnished by the plaintiff to the defendant after the fifth of October, were not delivered in the performance of the Hawley contract, but that they were delivered by the special permission of the defendant, and accepted by the latter upon the request of the plaintiff, without waiver of the breach. There is, therefore, no question presented in that respect requiring any consideration here. There is no occasion to consider any other question which the plaintiff's counsel has sought to raise upon the merits on this review, as none other is presented by exception.

The court refused to charge several propositions as requested by the plaintiff's counsel, who took a single exception to all of such refusals. It is unnecessary to inquire whether an exception to any one of them would have been good, inasmuch as it would not have been well taken to some of them. (*Magee v. Badger*, 34 N. Y. 247.)

There was no error in the rulings upon the admissibility of evidence to which any exception was taken. No other question seems to require consideration.

The judgment should be affirmed.

All concur, except BROWN, J., not sitting.

Judgment affirmed.

Statement of case.

CAMPBELL PRINTING PRESS AND MANUFACTURING COMPANY,
Respondent, v. STILLMAN R. WALKER, Appellant.

The estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, were comprehended and involved in the thing expressly stated and decided, whether they were or were not actually litigated or considered. It is not necessary that issue should have been taken upon the precise point controverted in the second action.

T. purchased three printing presses of plaintiff under a written agreement, which provided for a settlement by notes within one year; also, that the buyer should give a policy of insurance on the purchase and security for the payment made by note, and that the title to the presses should remain in plaintiff until payment was made or security given for the deferred payment. T. did not give a policy of insurance, nor did he give any security for notes executed by him under the contract; these were renewed from time to time at his request, and before payment he made an assignment to defendant for the benefit of creditors. In an action to recover possession of the presses, *held*, that the giving of the notes did not operate as payment; that, under the contract, no title passed until security was given or payment made in full; and that plaintiff was entitled to recover.

(Argued March 6, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 18, 1887, which affirmed a judgment in favor of plaintiff, entered on a verdict directed by the court.

The nature of the action and the facts are sufficiently stated in the opinion.

George W. Stevens for appellant. The several transactions having been resolved into a single one, the judgment in action No. 1 is a bar to this action. (*Secor v. Sturgis*, 16 N. Y. 548; *Baird v. United States*, 96 U. S. 430; *Jex v. Jacob*, 19 Hun, 105.) A court or referee can only render a decision that will be binding or effective to the extent only that it is within the issues. (*Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.) If plaintiff saw fit to accept the notes without security, it thereby waived the requirement of the contract in that regard.

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(*Smith v. Lynes*, 5 N. Y. 44.) While, for the purpose of arriving at the intention of the parties, the law permits evidence to be adduced showing the facts attendant upon and circumstances under which a contract in writing is executed, it rigidly excludes, except in cases of latent ambiguity, the conversations which led up to it. (*Reynolds v. Commerce Fire Ins. Co.*, 47 N. Y. 606; *Blossom v. Griffin*, 13 id. 573; *La Farge v. Reckert*, 5 Wend. 187; *P. S. B. Co. v. U. P. S. B. Co.*, 109 U. S. 672; *Gavinzel v. Crump*, 22 Wall. 308; *Emerson v. Slater*, 22 How. 28; *Oelricks v. Ford*, 23 id. 49; 2 Parsons on Contracts, 77, note 2.)

Charles De Hart Brower for respondent. The contract set forth in the complaint has never been abrogated or merged into a new contract. (*Zimmerman v. Erhard*, 83 N. Y. 74, 78; *Millard v. M., K. & T. R. R. Co.*, 86 id. 441; 2 Jones on Mort. § 934; *Jagger Iron Works v. Walker*, 76 N. Y. 521; *Nat. Bk. v. Morgan*, 6 Hun, 346; 2 Danl. Neg. Instr. § 1260; 1 id. § 206; *Boxheimer v. Gunn*, 24 Mich. 372; *Nightingale v. Chaffee*, 11 R. I. 600; *McGuire v. Gadsby*, 3 Cal. 234; *Hill v. Beebe*, 13 N. Y. 556; *Eldredge v. Strenz*, 2 J. & S. 491 [499].) The judgment-roll in action No. 1 is conclusive against appellant's contention that the former recovery was upon the same cause of action now sued on. (*Campbell v. Butts*, 3 N. Y. 173; *Stowell v. Chamberlain*, 60 id. 272; 2 Herman on Estop. and Res Adjudicata, § 1271; *Griffin v. L. I. R. R. Co.*, 102 N. Y. 449, 452; *Pray v. Hege-man*, 98 id. 351, 358; *Castle v. Noyes*, 14 id. 329; *H. F. S. Assn. v. Mayor, etc.*, 3 How. Pr. 448.) The title to the printing presses in question has never passed out of the plaintiff. (*Parshall v. Eggert*, 54 N. Y. 18; *Coyne v. Weaver*, 84 id. 386, 390.) Where a word may apply equally to any one of several things, the sense in which both parties used the word may be shown by parol. (1 Greenl. on Ev. § 295a, note 1; *Thorington v. Smith*, 8 Wall. 1, 12; *Gray v. Harper*, 1 Story, 574; *Almgren v. Dutilh*, 5 N. Y. 28; *M. P. Co. v. Moore*, 104 id. 680.) To take a case to the jury there must be evidence

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upon which a jury can properly proceed to find a verdict for the party producing it. (*Dwight v. G. L. Ins. Co.*, 103 N. Y. 341, 359.)

HAIGHT, J. This action is one of replevin, brought to recover the possession of three printing presses. The defendant is assignee for the benefit of creditors of Frank Tousey, and the presses in suit came into his possession as such assignee. Tousey had purchased the presses of the plaintiff and agreed to pay therefor the sum of \$8,700. The agreement was in writing, and bears date November 26, 1881, and contains the following provisions: "Settlement to be made by notes within one year, and interest; the buyer to furnish, at his own cost, proper and suitable foundation; policy of insurance to be given on the purchase, and security for the payment made by note. It is agreed that the title to the above-described property remain in the seller until the payment has been made or security given for the deferred payments as above agreed."

The defendant had at this time purchased other presses of plaintiff, on five different occasions, and thereafter purchased still other presses under a subsequent contract, dated December 15, 1881, making in all fifteen presses. The contracts in ~~each~~ case containing provisions similar to those quoted.

In addition to the fifteen presses purchased of plaintiff, Tousey had also purchased two presses from one Ovens, who had purchased them of plaintiff under a similar arrangement, but had not completed the payments therefor, and Tousey assumed and agreed to pay the balance remaining unpaid thereon. In December, 1883, plaintiff gave Tousey a certificate to the effect that five presses had been paid for in full, which included the two presses sold to Ovens and three to Tousey under the earlier contracts. Tousey gave notes to the plaintiff for the amounts of the several purchases.

After the last purchase was made he was unable to make the payments on the notes falling due, and applied to the

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plaintiff to renew the same, which was done. They waited until a number of the past-due notes had accumulated and divided up the amount thereof, giving smaller notes. This process was continued until Tousey made his assignment to the defendant, at which time his indebtedness to the plaintiff amounted to upwards of \$30,000, and was represented by notes of about \$200 each, maturing weekly.

At the time this action was brought, plaintiff commenced four other similar actions, each being for the presses delivered pursuant to one of the last five contracts. The action that was brought to recover the four presses delivered under the last contract has duly proceeded to judgment, and that judgment the defendant has pleaded in bar of this action.

After the evidence was closed the defendant requested the court to charge the jury, "that if the jury find that it was understood between plaintiff and Frank Tousey that all of the presses which had been delivered by the former should be considered as delivered under a single contract, so that the title of all was to remain in the vendor, the plaintiff, until the agreed price of all should be paid, they must render a verdict for defendant."

"*Second.* If there was any such understanding as to the twelve presses which remained unpaid for after the release of five in December, 1883, they must find for the defendant; and

"*Third.* The jury may find such understanding existed from the acts of the parties."

The court refused to charge either of the propositions, and to such refusal the defendant excepted. The court thereupon directed the jury to find a verdict for plaintiff, that the title was in the plaintiff and not in the defendant; that the plaintiff retain the possession of the property, to which direction exception was also taken by the defendant.

It is contended, on the part of the appellant, that the court should have submitted these questions to the jury, and that the exceptions taken upon such refusal necessitates a reversal of the judgment. The determination of this question involves a careful consideration of the evidence, and a determination as

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to whether there was any subsequent arrangement between the parties by which the five contracts became amalgamated into one contract so that the title to the twelve presses would remain in the plaintiff until the entire amount owing by Tousey to the plaintiff was paid.

We have not thought it necessary to determine this question, for the reason that we consider it disposed of by the facts found by the referee upon the trial of the former action, which the defendant has pleaded in bar to this action, the record of which was put in evidence by him. In that action the referee found that the acceptance of new notes for each ascertained balance of account was for the accommodation of Tousey by way of extension of the time of payment of the purchase-money, and that the parties did not intend thereby to modify in any respect the terms of the contract in reference to the presses in suit, beyond extending the time.

In that action the complaint alleged the sale by plaintiff of four printing presses to Tousey, under a contract containing similar clauses to those contained in the contract in this action ; the execution and delivery of promissory notes for the purchase-price ; the renewal of the notes when they became due ; the amount that was unpaid upon such renewal notes ; that payment had been demanded and refused. The defendant in his answer, among other things, denied that the presses were delivered to Tousey in pursuance of the contract alleged in the complaint, and alleged that the presses were held under an arrangement which he has set forth in his answer, and denied that he had any knowledge or information sufficient to form a belief as to the allegations in the complaint that when the several installments became due and payable, the plaintiff, at the request of Tousey, and upon receiving payments on account of the same, extended the time of payment of the several installments, and continued so extending the time of payment of the balance of the purchase-price until the 22d of May, 1885, and that there is now unpaid on account of the aforesaid purchase-price, the sum of \$8,000 and upwards, etc.

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It thus became necessary for the court in that action to determine whether the presses were delivered under the contract alleged in the complaint, or under an arrangement as claimed by defendant; and, also, as to whether the payments had been extended at the request or for the accommodation of Tousey. This was done by the finding referred to, in which the referee, as we have seen, has expressly found that the payments were extended for the accommodation of Tousey, and that there was no modification of the written contract set forth in the complaint. It, therefore, appears to us that the finding was material and embraced in the issue joined.

We regard the rule as well stated by ANDREWS, J., in the case of *Pray v. Hegeman* (98 N. Y. 351-358), in which he states "that the estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, are comprehended and involved in the thing expressly stated and decided, and whether they were or were not actually litigated or considered. It is not necessary to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action." (*Campbell v. Butts*, 3 N. Y. 175; *Embry v. Conner*, Id. 511-522; *Castle v. Noyes*, 14 id. 329; *Stowell v. Chamberlain*, 60 id. 272; *Dunham v. Bower*, 77 id. 76; *Griffin v. L. I. R. R. Co.*, 102 id. 449.)

The case of *Remington Paper Company v. O'Dougherty* (81 N. Y. 474) is not in conflict with the rule here stated.

It is contended that under the terms of the contract under which the presses were delivered that the title passed to Tousey upon his delivering to the plaintiff promissory notes for the amount of the purchase-price; that under the contract the notes operated as payment. This question must be determined from the provisions of the contract, unless the same are ambiguous. It appears, as we have seen, that a policy of insurance is to be given on the presses and security for the payment made by note, and it is agreed that the title to the

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property remain in the seller until the payments be made or the security given for the deferred payments as agreed.

It does not appear to us that there can be any doubt as to the intention of the parties as expressed in this agreement. Security is to be given for the payment made by note. The giving of notes is not sufficient. The notes must be accompanied by security. If no security is given, then it is agreed that the title shall remain in the seller until the payments have been made or the security given for the deferred payments. In other words, the title to the presses would pass to Tousey had he given the notes with security for their payment. Not having given security, the title remained in the seller until the payments were made, or until the security was given for those not made.

If we are correct in thus construing the contract, it becomes unnecessary to consider the exception taken to the admission of parol evidence as to what was said by the parties at the time the agreement was made, as it becomes unimportant.

It follows that the judgment should be affirmed, with costs.

All.concur.

Judgment affirmed.

ADELLA L. OTIS ET AL., EXECUTORS, ETC., APPELLANTS AND RESPONDENTS, V. EUSTACE CONWAY, AS COMMITTEE, ETC., APPELLANT AND RESPONDENT.

The creditors of an insolvent lessee have no equitable claim to the profits issuing from leased land until after the landlord's claim for rent is satisfied.

Plaintiffs leased certain premises to S., who, thereafter, was adjudged a lunatic and a committee of his estate appointed. While proceedings were pending to compel the committee to pay rent, by agreement rent paid in by a sub-tenant of a portion of the premises was deposited to await the result of this action to determine who was entitled thereto. It appeared that the estate was insolvent. Held, that plaintiff was entitled to so much of the sum deposited as was paid for rent which accrued after default in payment of rent under the original lease.

In re Otis (101 N. Y. 580) distinguished.

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While said proceeding was pending the parties entered into stipulations, under and in pursuance of which a part of the premises was leased to different parties. Each of the stipulations recited that the tenant named therein might occupy "for the benefit of whom it may concern," and that the assent of the parties thereto should in no respect alter their legal position toward each other; all but one provided that payment of rent by check should be deposited, and at the determination of the controversy paid "to the party held to be in possession of the said premises." It was finally adjudged in said proceedings that the lunatic himself was in possession. *Held*, that defendant, as committee, was entitled, under the stipulation, to the rent so paid in and deposited.

The other stipulation provided that the rent should be deposited "and finally paid over to the party ultimately entitled thereto." *Held*, that this referred to the final determination of the pending proceeding, and that the lunatic and his estate were entitled thereto.

(Argued March 7, 1889; decided March 19, 1889.)

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 13, 1887, which reversed so much of a judgment entered upon a decision of the court on trial at Special Term as adjudged that defendant was entitled to the amount of various deposits with the American Loan and Trust Company of rent paid in under leases of portions of the premises described in the complaint, which deposits were made pursuant to stipulations between the parties, and which affirmed so much of said judgment as adjudged that defendant was entitled to all rents due from Jacob Godhelp to Oscar Strasburger, a lunatic, of whose estate defendant is the committee, under a sub-lease of a portion of the said premises.

This action was brought to determine the rights of the parties to said rents and deposits.

The material facts are stated in the opinion.

John L. Cadwalader for plaintiffs. The estate of Oscar Strasburger being insolvent, the plaintiffs are entitled, as against other creditors, to receive any rent earned by the demised premises until their rent is paid in full. (1 Story's Equity Jur. § 687; Taylor's Landlord and Tenant [4th ed.] § 659; *Goddard v. Keate*, 1 Vern. 87; *Riggs v. Whitney*,

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15 Abb. Pr. 388; *Borell v. Newell*, 3 Daly, 233; *Peck v. Ingersoll*, 7 N. Y. 528; High on Receivers, § 470; Hunter on Landlord and Tenant [1886] 175, 411.) The evidence of the proposition to compromise admitted under objection and exception was entirely inadmissible. (1 Phillips on Ev. [Cow., Hill and Edw. notes, 5th Am. ed.], 350, note 124; Greenleaf on Ev. § 192; *Payne v. Forty-second St. R. Co.*, 40 N. Y. Super. Ct. 8; *Williams v. Thorp*, 8 Cow. 202.)

Eustace Conway for defendant in person. A court of equity will not now entertain any claim on the part of plaintiffs to the earnings or the property or to any preference over the other creditors. (Taylor on Landlord and Tenant, § 659.) If the stipulations mean anything except to prevent either party waiving his rights, they mean that the lunatic is entitled to the moneys, as he was the party held to be ultimately entitled thereto, and held to be in possession of the premises. (*In re Otis*, 101 N. Y. 585.)

BROWN, J. There is no dispute between the parties as to the facts which lie at the foundation of this controversy.

On January 1, 1881, the plaintiffs leased to Oscar Strasburger property in Broadway, in the city of New York, for the term of five years, at an annual rent payable on the first days of February, May, August and November in each year. In September, 1884, Strasburger was adjudged to be a lunatic and his son Albert was appointed his committee. Strasburger had occupied a part of the leased land for business purposes, and his son, after his appointment as committee, continued the occupation until November 20, 1884, at which time the business appears to have ceased. Pursuant to orders of the Supreme Court, the committee paid to the plaintiffs the rent due on November 1, 1884, and February 1, 1885. In February, 1885, Albert Strasburger was permitted by the Supreme Court to resign and the defendant was appointed as committee in his stead. Upon application by the plaintiff, the Special Term of the Supreme Court ordered the defendant to pay the rent fall-

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ing due May 1, 1885, but such order was afterwards reversed by the general Term, and upon appeal to this court the order of the General Term was affirmed. (*In re Otis*, 101 N. Y. 580.) While this proceeding was pending, the parties entered into stipulations relating to the leasing of the property. Under these stipulations a part of the property was rented during the year 1885, and the fund thus accumulated forms one of the elements of the dispute between the parties.

It also appears that Strasburger, prior to the order adjudging him a lunatic, had leased a part of the property to one Jacob Godhelp, who occupied until January 1, 1886. Godhelp's rent for the year 1885 has not been paid to either party, but by agreement has been deposited with the American Loan and Trust Company to await the determination of this action, and this sum constitutes the second item of the plaintiff's claim.

We think that the plaintiff's claim to have the Godhelp rent paid to them is well founded. The lunatic's estate is insolvent, and will pay but a small percentage upon the debts conceded to exist against it. Technically, rent is something which a tenant renders out of the profits of the land which he enjoys. Equitably, it is a charge upon the estate, and the lessee, in good conscience, ought not to take the profits thereof without a due discharge of the rent. (*Goddard v. Keate*, 1 Vern. 87; 1 Story's Eq. Jur. § 687; Taylor's Landl. and Ten. 659; 2 Platt on Leases, § 185; *Riggs v. Whitney*, 15 Abb. Pr. 388.)

The creditors of an insolvent lessee can have no moral or equitable claim to the profits issuing from leased land, until after the landlord's claim for rent is satisfied. The defendant argues, however, that this question was settled adversely to the plaintiff, by the decision of this court in the *Matter of Otis* (101 N. Y. 580), and such was the opinion of the General Term. This question was not involved in the case cited. That proceeding arose on a petition of the plaintiffs, in which it was sought to make the rent a preferred debt against the lunatic's estate, on the ground that the committee was an equitable

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assignee of the lease. No reference was made to the Godhelp rent, and the equitable right to have that applied to the payment of the landlord's debt was not presented to the court. This court held that the committee was not an assignee of the lease, but a mere custodian of the lunatic's estate, and that there was no equitable principle upon which a demand for rent takes preference of other debts, in the absence of a special equity growing out of the circumstances of a particular case. That language was applicable to the case then before the court, but has no application to the present appeal. Godhelp was not a party to the other proceeding, nor had his rent then been deposited in court, and the form of the proceeding and the absence of the necessary parties precluded the award of such equitable relief as is sought in this action.

The rent on the original lease to Strasburger having, however, been paid in full to February 1, 1885, the plaintiffs' right to the rent due from the sub-tenant must be limited to that which accrued subsequent to the last-named date.

As to the other fund the plaintiffs do not assert in the complaint any equitable claim, but base their rights thereto upon the stipulations. The tenants whose rents formed this fund were not sub-tenants of the original lessee, but went into possession under the consent of all parties contained in the stipulations, and, as to the rent accruing from their occupation, the parties have made their own agreement and created the law that must govern its distribution. All the stipulations recite the existence of differences between the parties as to the payment of the rent named in the lease to Strasburger, and that the premises are vacant, and each provides that the tenant named therein may occupy "for the benefit of whom it may concern," and that the assent to the agreement should in no respect alter the legal position of the parties toward each other. All except the first provide that payment of the rent shall be made by a certified check payable to the order of Strong and Cadwalader and Eustace Conway, committee, jointly, and that the same shall be deposited in the American Loan and Trust

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Company until the final determination of the said controversy; "and that at the determination of the question at difference between the parties, both parties shall join in indorsing to the party *held to be in possession of the said premises.*" The parties thus fixed the time when and the event, which should determine the right to the possession of these checks. It is not disputed that the controversy thus named was the proceeding I have already referred to and which was finally decided in this court, and that the final determination therein was, that the lunatic himself was in possession of the demised premises.

This statement would seem to be sufficient to determine, that the defendant, as the committee of the lunatic, was entitled to have the checks indorsed by the plaintiffs and delivered to him. But the plaintiffs claim that the real meaning of the agreement was, that the party who was defeated in that proceeding should receive the rent paid by the tenants under the stipulation. We can find nothing in the case to justify such a construction. Certainly it could not have been claimed that the plaintiffs were in possession of the premises. They had refused to accept a surrender of the lease, and the various proceedings in this court and in the Supreme Court to obtain payment of the rent from the committee were based on the existence and validity of the original lease.

It is possible that it may have been the purpose of the parties that the plaintiffs were to receive these rents in case they were unsuccessful in the proceeding then pending and referred to in the stipulation, but they expressed no such purpose in the agreement they signed, and we must give effect to the plain language of those instruments. The point in dispute was, was the committee to be regarded as in possession as the equitable assignee of the lease? If he was, then he would be compelled to pay plaintiff the rent reserved in the original lease, and the rents covered by the stipulations would be his. But as this court held the lunatic was in possession, by the plain language of the agreement, the rents are his, and the checks must be indorsed by plaintiffs and delivered to the

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committee. The first stipulation differs from the other in providing that the rent should be deposited "and finally paid over to the party ultimately entitled thereto." This, we think, referred to the final determination in the proceeding then pending. It had no reference to any equitable claim that the landlord might afterwards assert to the rents from sub-tenants, but provided for payment to the party who ultimately should be decided to be legally entitled thereto. The lunatic is such party, and his estate is entitled to the rent covered by these stipulations.

Our conclusion being different from both of the courts below, the judgment of the General and Special Terms should be reversed and a new trial granted, without costs to either party against the other in this court.

All concur.

Judgments reversed.

**THE PEOPLE ex rel. NICHOLAS COOPER, Respondent, v. THE
REGISTRAR OF ARREARS OF THE CITY OF BROOKLYN,
Appellant.**

Taxes assessed for the years 1882, 1883, 1884 and 1885 upon certain lots in the city of Brooklyn owned by the relator, being in arrears, he called at the office of the registrar of arrears and asked the clerk charged with that duty to give him all the bills for taxes, etc., against his property, stating that he wished to settle up. He was given the bills for the taxes for 1882, 1883 and 1884, which he paid, but no bill for 1885 was given to him. The registrar subsequently sold the lots for the unpaid taxes of 1885. The relator, as soon as he learned of this, tendered to the registrar the amount of such unpaid tax, which was refused. *Held*, that under the charter of the city (§ 16, tit. 8, chap. 863, Laws of 1878), it was the duty of the registrar upon the request of the relator to furnish him with a correct statement of all unpaid taxes upon his lots; that the sale was void and the relator was entitled to a *mandamus* to compel the registrar to accept the tax and cancel the sale; also, that as the purchaser had not received a conveyance he was not a necessary party.

It seems where a taxpayer calls upon the proper officer for a statement of all the taxes due from him, receives a statement and pays all of the taxes

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included therein, and afterwards the land is sold for non-payment of taxes in arrear at the time the statement was furnished, but which were omitted from it by the neglect of the officer or his clerk, the title of the taxpayer is not divested by the sale.

(Argued March 7, 1889; decided March 19, 1889.)

APPEAL from order of the General Term of the Supreme Court of the second judicial department, made September 19, 1887, which affirmed a final order of Special Term granting a peremptory writ of *mandamus*, the requirements of which, as well as the material facts, are stated in the opinion.

Almet F. Jenks for appellant. The relator must make out a case as a plaintiff would and show himself free from imputation of want of care, and that he took every step which a reasonable man should take before he can ask the aid of the court against the negligence of the respondent. (*People ex rel. Post v. Ransom*, 2 N. Y. 492; *People ex rel. Mygatt v. Suprs.*, 11 id. 563-574; *People ex rel. Martin v. Brown*, 55 id. 180, 191; *Com. Bank v. Canal Comrs.*, 10 Wend. 26.) The court erred in granting a writ of *mandamus*. (*People v. Hayt*, 66 N. Y. 606; *People v. Burn*, 9 Abb. N. C. 127, note; *Adsit v. Brady*, 4 Hill, 630.)

William J. Gaynor for respondent. Apart from any specific statutory requirement, and on general principles, that it is the duty of tax receiving officers to render a full bill, to give correct information, and failure to do so, by which the taxpayer is misled and prevented from paying a lien on his property, renders the sale for the non-payment of such lien unauthorized and void. (*Van Benthuyzen v. Sawyer*, 35 N. Y. 150; *Mayer v. Mayor, etc.*, 63 id. 455; *Breisch v. Coxe*, 81 Pa. St. 336; *Bubb v. Tompkins*, 47 id. 359.) The purchaser at a pretended sale is not a necessary or proper party here. (*Clementi v. Jackson*, 92 N. Y. 591; *People ex rel. v. Cady*, 51 Supr. Ct. 316.) The omission of relator's counsel to object to the charge that if the relator applied generally to the registrar for all taxes and liens, as he testi-

Opinion of the Court, per FOLLETT, Ch. J.

fied, and the items were omitted, the relator was entitled to a verdict, was a distinct assent to the law of the case, and a waiver of the previous exception to the motion to dismiss. (*Lahr v. Railway Co.*, 104 N. Y. 294.)

FOLLETT, Ch. J. The relator for many years has owned lots Nos. 41, 42 and 43 in block No. 55 in the city of Brooklyn. On March 18, 1886, the taxes assessed upon these lots, for the years 1882, 1883, 1884 and 1885, were due and in arrear. On this date the relator called at the office of the registrar, whose duty it was to receive payment for taxes in arrear, and he told the clerk, who was charged with the duty of furnishing taxpayers with a statement of the amount due from them for taxes, "that I wanted him to give me all the bills for my taxes and assessments, water rent and liens against the property; that I wanted to settle up." He said "'all right; you had better leave them and come in again,' and I did." About an hour after this interview the relator returned to the registrar's office and received the bills for the taxes for the years 1882, 1883 and 1884, amounting to \$3,288.66, which he paid. No bill for taxes of 1885 was handed to the relator. On the 19th of May, 1886, the registrar sold the lots for the arrears of 1885, which fact was learned by the relator on the twenty-second of May, and on the same day he tendered to the registrar sufficient money to pay the taxes for that year, which he refused to receive. Thereupon the relator obtained an alternative writ of *mandamus* in which these facts were alleged, requiring the defendant to show cause why he should not receive the amount due for taxes and cancel the sale. The defendant answered denying the allegations. Upon the trial the jury found this issue in favor of the relator. Upon the coming in of the verdict a judgment was entered directing that a peremptory writ of *mandamus* issue requiring the defendant to receive the taxes and cancel the sale. Upon appeal to the General Term the judgment was affirmed.

When a taxpayer calls upon the proper officer for a statement of all the taxes due from him, and receives a statement

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and pays all of the taxes included therein, and afterwards the land is sold for the non-payment of taxes in arrear at the time the statement was furnished, but which were omitted from the statement by the neglect of the officer or his clerk, the title of the taxpayer is not divested by the sale. (*Van Benthuyzen v. Sawyer*, 36 N. Y. 150; *Breisch v. Coxe*, 81 Penn. St. 336; *Forrest v. Henry*, 33 Minn. 434-436; *Martin v. Barbour*, 34 Fed. Rep. 701-710; Black. on Tax Titles [5th ed.] §§ 717, 725.)

Section 16 of title 8 of chapter 863, Laws 1873 (the charter of the city of Brooklyn) provides: "The registrar of arrears, upon the requisition of any person, shall furnish a bill of any arrears of assessments, taxes and water rates so transmitted or returned to him; also of the amounts necessary to redeem any lot or lots sold for the like dues thereon, if it or they be yet redeemable, which shall be called a "bill of arrears or assessments, taxes and water rates, and for redemption;" and upon payment of the amount, his receipt thereon shall be conclusive evidence of such payment, and forever free the said lot or lots from all liens therein specified." Under this section it was the plain duty of the registrar, upon the oral request of the relator, to furnish him with a correct statement of all unpaid taxes upon the lots specified.

Section 24 of title 8 of this chapter has no application to the case of the taxpayer, who, for the purpose of paying his taxes, specifies his lots and demands a statement or bill of the amount of taxes due from him on such lots.

Mandamus is the proper remedy to compel the defendant to receive the taxes and cancel the sale, and the purchaser not having received a conveyance is not a necessary party thereto. (*Clementi v. Jackson*, 92 N. Y. 591; *People ex rel. Townshend v. Cady*, 19 J. & S. 316, affd. 99 N. Y. 620.)

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

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ELIZA ANN SHAFFER, Respondent, *v.* JOSEPH H. RISELEY,
Appellant.

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It seems that where the affidavit annexed to a petition for his discharge presented by a person imprisoned upon execution, is not made on the day of the presentation of the petition, as required by the Code of Civil Procedure (§ 2204), but on a previous day, the court acquires no jurisdiction, and where an order of discharge granted thereon contains no recital of a compliance with this requirement, it is no protection to the sheriff; if, therefore, he obeys the order he renders himself liable for an escape. Where, however, the petition in such a case was duly served upon the attorney of the judgment-creditor and he, as such attorney, appeared on presentation of the petition and application for the order of discharge, without raising the objection, *held*, that this was a waiver thereof, and that it could not be raised thereafter in an action against the sheriff for an escape.

Bulymore v. Cooper (46 N. Y. 236) distinguished.

Shaffer v. Risely (44 N. Y., 6) reversed.

(Argued March 8, 1889; decided March 19, 1889.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made March 8, 1887, which reversed a judgment in favor of defendant, entered upon a verdict directed by the court.

The nature of the action and the material facts are stated in the opinion.

John F. Cloonan for appellant. The order of discharge served upon the sheriff was regular on its face, contained recitals of all the necessary facts to give jurisdiction to the court granting it, and of itself protects the sheriff in discharging the prisoner, whether jurisdiction actually existed or not. (*Devlin v. Cooper*, 84 N. Y. 410; *Goodwin v. Griffis*, 88 id. 629, 633, 634; *Hart v. Du Bois*, 20 Wend. 236; *Weber v. Gay*, 24 id. 485; *People v. Warren*, 5 Hill, 440; *Chegaray v. Jenkins*, 5 N. Y. 376; *Savacool v. Boughton*, 5 Wend. 171.) The court had jurisdiction and the order not only protects the sheriff, but is valid and binding upon every party to the proceeding. (Code of Civil Pro. §§ 2201, 2205; *Richmond v. Priam*, 24 Hun, 578; *Hart v. Du Bois*, 20 Wend.

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236.) The act of the plaintiff, by her attorney, in appearing generally in the proceeding, in not objecting to the jurisdiction of the court in permitting the order discharging the prisoner to be served upon a public officer, who acted in good faith under it, constitutes a waiver and is a bar to recovery in this case. (*Hart v. DuBois*, 20 Wend. 236; *Olcott v. Maclean*, 73 N. Y. 223, 225; *Ward v. Craig*, 87 id. 550, 557, 558; *Hilton v. Fonda*, 86 id. 339; *In re Cooper*, 93 id. 507; *Poffinger v. Yutte*, 102 id. 38; *Carpenter v. Minturn*, 65 Barb. 293; *People v. Bancker*, 5 N. Y. 106; *Dake v. Miller*, 15 Hun, 356; *Phyfe v. Eimer*, 45 N. Y. 102; *Johnson v. Oppenheim*, 55 id. 291.) Recitals contained in the record of the proceedings for the discharge of the insolvent debtor are presumptive evidence of the facts therein contained. (*Lewis v. Penfield*, 39 How. 491; *Rowe v. Parsons*, 6 Hun, 338; *Ferguson v. Crawford*, 70 N. Y. 253; *People ex rel. Frey v. Worden*, 100 id. 26.) Plaintiff being a party to the proceeding, in the absence of all other evidence, is absolutely bound by the record of those proceedings. (Greenleaf on Ev. [12th ed.] § 523; *Nemetty v. Nalor*, 100 N. Y. 569; *Wood v. Jackson*, 8 Wend. 9; *Castle v. Noyes*, 14 N. Y. 329.) The judgment is valid and continued in full force and effect notwithstanding the discharge. (Code of Civil Pro. § 2213; *Prussia, Overseer, etc., v. Brown*, 9 State Rep. 629; *Browne v. Bradley*, 5 Abb. 141.)

William Lounsbury for respondent. The order of the county judge, made on the 17th day of March, 1885, directing the discharge, does not recite the proceedings necessary under the Code to vest the court with jurisdiction. (*Bullymore v. Cooper*, 2 Lans. 71; 46 N. Y. 236, 243; *Richmond v. Priam*, 24 Hun, 578; *Develin v. Cooper*, 84 N. Y. 414; *Goodwin v. Griffis*, 88 id. 637.) The affidavit to the petition was defective, not having been subscribed and taken by the petitioner on the day of the presentation of the petition. (Code, § 2204; *Browne v. Bradley*, 5 Abb. 141; *Bullymore v. Cooper*, 2 Lans. 71; *Richmond v. Priam*, 24 Hun, 578.)

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The recital on the orders that they were granted "after hearing D. W. Sparling, attorney for said plaintiff," does not imply the consent of the plaintiff. (*Hart v. Du Bois*, 20 Wend. 236; *Richmond v. Priam*, 24 Hun, 578.) The affidavit was a necessary step to be taken that could not be waived by implication. Any act short of actual consent was ineffectual. (*Johnson v. Oppenheim*, 55 N. Y. 291.) The writing of the order was not the act of the petitioner, who took it from the court, and if he is to avail himself of anything said or not said by the plaintiff's attorney, he should have stated it in the order, by way of admission or waiver. (*Davis v. Packard*, 7 Peters, 276; 8 id. 314; *Valarino v. Thompson*, 7 N. Y. 576; *Coffin v. Reynolds*, 37 id. 640.)

BRADLEY, J. The defendant was sheriff of the county of Ulster. This action was brought to recover for an alleged escape of one Samuel H. Palmer, who had been imprisoned in the jail of that county, upon execution issued on a judgment recovered against him by the plaintiff. The defendant discharged Palmer from such imprisonment pursuant to an order of the County Court of the county of Ulster, in which such judgment was recovered. The ground upon which the plaintiff relies to support the action is that it appeared neither by the recitals in the order nor by the proceedings in which it was made that the County Court had jurisdiction to make it. The order did not recite all the facts requisite to jurisdiction. And by reference to the proceedings had in the County Court, it appears that the provisions of the statute were complied with except as to the time of making the affidavit annexed to the petition. The statute requires that such affidavit be made on the day of the presentation of the petition. (Code of Civ. Pro. § 2204.) It was not then made, but was made seventeen days before that day. The rule applicable to such cases is that the sheriff is protected in obeying the mandate of the order if it contain a recital of all the facts requisite to the jurisdiction of the court in the proceeding in which the order

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is made; but if it fail to recite any of such facts, the officer is liable if he discharge the judgment-debtor unless he makes it appear that the court did, in fact, have jurisdiction to make the order. (*Bulymore v. Cooper*, 46 N. Y. 236.)

The failure to make, on the day of the presentation of the petition, the required affidavit, rendered the proceedings jurisdictionally defective. And unless such defect was in some manner obviated, the defendant, in the discharge of Palmer from imprisonment, became liable to the plaintiff as for his escape. There was no question of public policy involved, but the proceeding was one in which the parties to the judgment upon which the execution was issued were alone interested. The imprisonment of a judgment-debtor in a case where it is allowable, is within the remedies provided for the benefit of the creditor for the collection of his judgment. The plaintiff's right was, to have the execution effectual, to retain Palmer in custody until he should be lawfully discharged. The judgment-debtor sought to so obtain his release, and for that purpose instituted by petition, in due form, the proceeding for his discharge from custody. This petition, with the proper notice, was served as provided by the statute, upon the plaintiff's attorney, whose name was subscribed to the execution. (Code, § 2206.)

He, as such attorney, appeared in the proceeding on the presentation of the petition, when the order was made directing the sheriff to bring Palmer before the court and upon the application for the order for his discharge, as appears by the orders. The question arises whether by such appearance and taking part in the proceeding the defect referred to was waived on the part of the plaintiff and the order directing the discharge of Palmer rendered valid. The court had general jurisdiction of the subject-matter, and in such case, as a general rule, the general appearance of a party waives, as to him, any want of jurisdiction of the person, unless the objection in that respect is specifically made.

It does not appear that any such objection was taken by the plaintiff's attorney, and, while it cannot be assumed that he

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consented to the making of the order in question, his opposition may be deemed to have been made on the merits as distinguished from objection to the jurisdiction of the court founded upon the defect above mentioned. The mere opposition of the attorney to the making the order may have been treated by the court as made in the proceeding to the discharge of the imprisoned debtor, rather than as an objection to the proceeding or to the power of the court to entertain it; and such may fairly be taken as the import of the action of the attorney so far as it is made to appear by the order. This represents him as appearing generally, and it in no manner appears in the record that he made the specific objection now sought to be raised to the proceeding. It cannot, therefore, be assumed that such objection was taken, and having failed to make it or to call the attention of the County Court to it, the plaintiff cannot take advantage of the particular defect in the proceedings, but it will be deemed to have been waived. (*People v. Bancker*, 5 N. Y. 106; *Hilton v. Fonda*, 86 id. 340; *Stevens v. Benton*, 2 Lans. 156; *Hart v. Du Bois*, 20 Wend. 236.)

No reason appears why the question of jurisdiction of the County Court to entertain the particular proceeding may not be thus effectually waived. We think the record permits the conclusion that it was done in this instance. It may be observed that in *Bullymore v. Cooper* there seems to have been no appearance of the creditor in the proceeding in which the order was made, and nothing was there waived.

These views lead to the conclusion that the order appealed from should be reversed, and the judgment entered on the verdict affirmed.

All concur, except PARKER, J., not sitting.

Order reversed and judgment affirmed.

Statement of case.

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**THE NATIONAL PARK BANK OF NEW YORK, Appellant, v. THE
SEABOARD BANK, Respondent.**

The title to commercial paper received by a bank for collection and forwarded to its correspondent bank in the usual course of business, without any express agreement in reference thereto, does not vest in such correspondent, even if it has remitted on general account in anticipation of collections.

When a raised draft so forwarded is presented by the correspondent bank, as agent, and the drawee, through mistake, pays it, the collecting bank cannot be required to repay, if it has paid over to its principal before notice of the mistake.

When payment is made upon general account without direction as to its application the law applies it to the oldest items.

A draft for \$8 drawn on the plaintiff, which had been raised to \$1,800, was delivered to the Eldred Bank for collection; that bank indorsed it "for collection for account of the Eldred Bank," and forwarded it to defendant, its correspondent bank. The latter, on receipt, credited the amount of the draft as raised to the Eldred Bank, presented it on July 16, 1885, and plaintiff, through a mistake of fact, paid it. All the banks acted in good faith; the alteration was not discovered until August 15. By the established course of business between defendant and the Eldred Bank the former did not become responsible for any draft so forwarded for collection, but was reimbursed by the latter in case of non-payment if it had made any credits, payments or remittances in anticipation of collection. At the time of the discovery the aggregate of the debits in defendant's account with the Eldred Bank exceeded the aggregate of credits by more than the \$1,800, but said balance arose wholly from transactions subsequent to the date when said draft was paid and the entire amount to the credit of the Eldred Bank when the draft was paid, including its proceeds, had been drawn out before the alteration was discovered. In an action to recover the amount so paid, less the face of the draft as drawn, the trial court found that the sum paid by plaintiff had, prior to August fifteenth, been paid over by defendant to the Eldred Bank; and that defendant never had any title to or interest in the draft. *Held*, that the said findings of fact were justified by the evidence and were conclusive here; and that the complaint was properly dismissed.

Met. Nat. Bk. v. Loyd (90 N. Y. 580) distinguished.

Reported below, 44 N. Y. 49.

(Argued March 8, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon

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an order made March 14, 1887, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial without a jury.

On the 7th of July, 1885, the First National Bank of Wallingford, Connecticut, drew on the plaintiff a draft in the usual form, for the sum of \$8, payable to the order of one Frank Saxton, and delivered the same to him. Subsequently, but prior to July 15, 1885, said draft was raised from \$8 to \$1,800, and on that day said Saxton indorsed it in blank and presented it to the Eldred Bank, of Eldred, Pennsylvania, with the request that it should collect the same for him.

The Eldred Bank received said draft for collection only, giving back a receipt to that effect; indorsed it to the order of defendant's cashier "for collection for account of the Eldred Bank, Eldred, Pa.," and at once forwarded it for collection to the defendant, its New York correspondent, which received it on the morning of July 16, 1885, and forthwith notified the Eldred Bank, by mail, that it had been received and placed to its credit. On the next day the defendant presented it, through the New York Clearing House, to the plaintiff for payment, and the plaintiff thereupon, through a mistake of fact, paid it to the defendant as a draft for \$1800. The change in said draft was unknown to each of said banks until about the 15th day of August, 1885, and all of them acted in good faith in the premises.

It was the custom of the defendant to notify the Eldred Bank immediately of a failure to collect any of its checks or drafts or of anything wrong in regard to them. The Eldred Bank waited until July 25, 1885, in order to be sure that everything was all right, when, not having heard anything to the contrary, it became satisfied that the draft was genuine in all respects, and paid over the proceeds thereof, less charges for collection, to said Saxton. According to the established course of business between the defendant and the Eldred Bank, the former did not become responsible for said draft, or for any draft, forwarded to it for collection by the cashier, but "was reimbursed by said Eldred Bank in case of the non-

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payment of any such draft * * * if the defendant had made any credits, payments or remittances, in anticipation of the collection of the same or on account thereof."

The defendant, upon receipt of said draft, credited the amount thereof to the Eldred Bank in the only account that it kept with the latter. Said account was balanced on July 21, 1885, and the balance carried to the credit of the same account, which remained open until after August fifteenth, but by that time the aggregate of the debits therein by the defendant to the Eldred Bank, since the last balancing thereof, including the balance then existing in favor of the Eldred Bank, exceeded the aggregate of the credits by considerably more than the sum of \$1,800, with interest thereon from July 17, 1885.

The plaintiff first learned that the draft had been altered on the 15th of August, 1885, when it notified the defendant of the fact and requested repayment of the difference between said sums, with interest, which the defendant refused, as it had already paid over the money to the Eldred Bank, which in turn had paid it to Saxton. At this time the balance to the credit of the Eldred Bank on the books of the defendant exceeded the amount of said draft, but said balance arose wholly from collections and transactions subsequent to the date when said draft was paid.

The plaintiff brought this action to recover from the defendant the difference between the genuine and the altered draft.

The justice before whom the cause was tried without a jury, found the foregoing facts, and also found specifically "that said sum of \$1,800 and all other sums of money in the possession of or under the control of the defendant on July 17, 1885, and on July 25, 1885, belonging to or to the credit of said Eldred Bank, had been, prior to August 15, 1885, the date of the aforesaid notice, paid over by the defendant to said Eldred Bank; that the defendant never had any title, ownership, interest or property in or to said check or draft, or any part thereof, and never assumed any title, ownership, interest or property in the same."

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Said justice found, as a conclusion of law, that the complaint should be dismissed upon the merits.

Francis C. Barlow for appellant. When the defendant collected the draft in question from the plaintiff, on July 17, 1885, the defendant was the owner of it. (*Met. Nat. Bk. v. Loyd*, 90 N. Y. 530.) The draft ceased to be the specific property of the Eldred Bank, and the latter became a creditor of the defendant for the amount, and the defendant became the owner of the paper. (*Met. Nat. Bk. v. Lloyd*, 90 N. Y. 530, 534, 535; 25 Hun, 101; *Cragie v. Hadley*, 99 N. Y. 133, 134; *St. Louis v. Johnson*, 37 Fed. Rep. 243; *Sweeney v. Easter*, 1 Wall. 166; Morse on Banking [3d ed.] §§ 565, 575; *Clark v. Mer. Bk.*, 2 N. Y. 380.) When an agent has in his hands more than the amount mispaid by him, he can repay it and make himself whole by merely charging the amount against his principal in account. (*Buller v. Harrison*, 1 Cowp. 565; *Mowatt v. McLelan*, 1 Wond. 178; *Cox v. Prentiss*, 3 M. & S. 345.) When neither creditor nor debtor make any application of a payment and the matter comes into court, then the court will make such application of the payment as equity and justice require. (*Bank v. Webb*, 94 N. Y. 472; *Jones v. Benedict*, 88 id. 79, 87; *In re Hallett*, L. R., 13 Ch. Div. 696; *Hall v. Otis*, 77 Me. 122, 124, 125; *Frye v. Lockwood*, 4 Cow. 457.) Money paid under a mistake of fact can be recovered back, and the mere fact that the party receiving it has changed his condition upon the faith of the payment is no defense to the action. (*Kingston Bk. v. Eltyng*, 40 N. Y. 399; *Mayer v. Mayor, etc.*, 2 Hun, 306, 307; *Bank v. Bank*, 55 N. Y. 213, 216; *Allen v. Bank*, 59 id. 19; *Price v. Neal*, 3 Burr. 1355; *Nat. Bk. v. Nat. Mec. Bk.*, 55 N. Y. 213; *Nat. Park Bk. v. Fourth Nat. Bk.*, 7 Abb. [N. S.] 138, 140-152; *Bank v. Banks*, 46 N.Y. 77, 81; *Nat. Park Bk. v. Ninth Nat. Bk.*, 55 Barb. 87, 90, 124.) Where alterations have been made in the body of an instrument the drawee who has paid can recover, and the drawee who has certified the paper cannot be compelled to pay it. (*Marine Nat. Bk. v. Nat. City Bk.*, 59 N. Y. 67,

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77; *Canal Bk. v. Bk. of Albany*, 1 Hill, 290; *Bk. of Commerce v. Union Bk.*, 3 N. Y. 234, 236; *White v. Continental Bk.*, 64 id. 320, 321; *Clews v. Bk. of N. Y.*, 89 id. 422; *Goddard v. Mer. Bk.*, 4 id. 147, 151; *Markle v. Hatfield*, 2 Johns. 462; *Mer. Bk. v. McIntyre*, 3 Sand. 434, 435; *Jones v. Ryde*, 5 Taunt. 495.) In the case at bar the plaintiff was not guilty of any negligence. (*Marine Bk. v. City Bk.*, 59 N. Y. 67; *Corn Exchange Bk. v. Nassau Bk.*, 91 id. 79; *White v. Continental Nat. Bk.*, 64 id. 320, 321; *Bk. of Commerce v. Union Bk.*, 3 id. 236.) A person who collects a draft asserts its genuineness, and is bound to repay the amount in such case as this whether he indorses it or not. (*White v. Continental Nat. Bk.*, 64 N. Y. 316, 320; *S. V. Bk. v. Loomis*, 85 id. 211; *Jones v. Ryde*, 5 Taunt. 488, 493; *Bk. of Commerce v. Union Bk.*, 3 N. Y. 237; *Corn Exchange Bk. v. Nassau Bk.*, 91 id. 174; *Herrick v. Whitney*, 15 Johns. 240; Story on Prom. Notes, §§ 117, 118.) But even if an indorsement were necessary to enable us to recover, it would be enough for us that the defendant indorsed the draft, as we are only suing them. The stamp "paid" was an indorsement. (Story on Prom. Notes, § 121; *Merchants' Bk. v. Spicer*, 6 Wend. 443; *Stoddard v. Hart*, 23 N. Y. 562; 1 Story's Eq. Jur. § 499; *Bank v. Hall*, 83 N. Y. 338, 345.) The defendant and the Eldred Bank having indorsed the draft, thereby guaranteed its genuineness. (*White v. Bank*, 64 N. Y. 320; *Turnbull v. Bowyer*, 40 id. 460; *Erwin v. Downs*, 15 id. 575.)

Alfred Taylor for respondent. Both the defendant and the Eldred Bank, its correspondent and principal, were merely collecting agents, and neither ever acquired any ownership in the draft. (1 Daniel on Negotiable Instruments [2d ed.] 552; *Sweeney v. Easter*, 1 Wall. 166; *Walton v. Shelly*, 1 Term, 296; *Dickerson v. Wason*, 47 N. Y. 439.) An agent who receives money for his principal is, after passing over the same to the principal, absolved from liability. (*Buller v. Harrison*, 1 Cowp. 566; *Mowatt v. McLelan*, 1 Wend. 174;

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Costigan v. Newnand, 12 Barb. 455; *Lafarge v. Kneeland*, 7 Cow. 460.) The defendant, having before notice of the raising of the draft paid over the proceeds to its principal, is absolved from liability. (1 Wait's Actions and Defenses, 178; 7 id. 420; *Sheppard v. Steele*, 43 N. Y. 52; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Walden v. Davison*, 11 Wend. 65; *Allen v. Culver*, 3 Denio, 293; *Dow v. Morewood*, 10 Barb. 189; *Commercial Bk. v. Union Bk.*, 11 N. Y. 214; *Adams Co. v. N. S. & L. Bk.*, 9 N. Y. S. R. 297; *Harding v. Tiff*, 75 N. Y. 464; *Bixby v. Drexel*, 56 How. 418.) Irrespective of the question whether or not the defendant paid over the proceeds of the draft, no recovery can be had, since it is conceded that the defendant's principal, the Eldred Bank, had paid over the proceeds to Saxton. (*Nat. Bk. of Commerce v. Nat. Mechanics' Banking Assn.*, 55 N. Y. 21.) The indorsement of the Eldred Bank "for collection," is a restrictive indorsement and does not bind the indorser to the rules and liabilities of a general indorser. Under such a restrictive indorsement the indorser is competent to prove that he is not the owner of the instrument, and did not mean to give title to it or to its proceeds when collected. (1 Daniel on Negotiable Instruments [2d ed.] 552; *Sweeney v. Easter*, 1 Wall. 166.)

VANN, J. When the draft in question was paid by the plaintiff under a mistake of fact, the defendant either owned it or simply held it for collection as the agent of the Eldred Bank. If the defendant had then owned the draft it would have become liable, upon discovery of the facts, to refund the amount mispaid, provided its condition had not in the meantime changed so that this would be unjust. (*Nat. Bk. of Commerce v. Nat. Mechanics' Banking Assn.*, 55 N. Y. 211; *White v. Continental Nat. Bk.*, 64 id. 316.) If, however, the defendant did not then own the draft, but merely presented it for payment as the agent of another bank, it could not be required to repay, provided it had paid over to its principal before notice of the mistake. (*La Farge v. Kneeland*,

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7 Cow. 460; *Mowatt v. McLelan*, 1 Wend. 173; *Herrick v. Gallagher*, 60 Barb. 566; Story on Agency, § 300.)

The plaintiff claimed that the entry made by the defendant on its books to the credit of the Eldred Bank, upon the receipt of the draft, proved that it belonged to the defendant, while the defendant claimed that the restrictive indorsement of the draft by the Eldred Bank prevented any change of title and simply created an agency for collection. A question of fact thus arose as to the intention of the parties to the transaction, to be determined by considering their words and acts, their course of business and all of the surrounding circumstances. We think that the decision of this question in favor of the defendant by the trial court, acting in the place of a jury, is conclusive upon us. Moreover, it seems to be settled that the title to commercial paper received for collection by a bank and forwarded to its correspondent in the usual course of business, without any express agreement in reference thereto, does not vest in such correspondent, even if it has remitted upon the general account in anticipation of collections. (*Dickerson v. Wason*, 47 N. Y. 439.) Title passes only by a contract to that effect, to be either expressly proved or inferred from an unequivocal course of dealing. (*Scott v. Ocean Bank*, 23 N. Y. 289.)

This would involve in the case at bar an agreement on the part of the defendant to become absolutely responsible to the Eldred Bank for the amount of the draft, whether it was collected or not, without any right to reimbursement for advances. (Id.) This was not the agreement of the parties to the transaction in question, either as found by the trial court or as appears from the undisputed evidence. In the case of *Metropolitan National Bank v. Loyd* (90 N. Y. 530), relied upon by the plaintiff, the referee found that the owner of a check endorsed it in blank and deposited it in a bank, which received it as a deposit of money, entered the amount as cash to his credit in his pass-book and returned the book to him. It was held that under those circumstances the property in the check passed from the customer and vested in the bank. No other

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result could follow a transfer, absolute in form and in fact, by one party and its receipt as cash by the other.

The learned counsel for the plaintiff concedes that an agent who has received money paid by mistake cannot be compelled to repay it where he has paid it over to his principal without notice, but he contends that as the specific proceeds of this draft were not paid over, the rule has no application. The trial court found, and the evidence clearly shows, that the proceeds of the draft, including the entire amount that the Eldred Bank had to its credit with the defendant when the draft was paid, had been drawn out at least two weeks before the alteration of the draft was discovered.

Where a payment is made upon general account with no direction as to its application, the law applies it to the oldest items. That is, the first debits are to be charged against the first credits and the debt paid according to priority of time. (*Sheppard v. Steele*, 43 N. Y. 52; *Allen v. Culver*, 3 Denio, 284; *Webb v. Dickinson*, 11 Wend. 65.)

In *Allen v. Culver* (*supra*, 293), the court said: "In the case of a running account between parties, where there are various items of debit on one side and of credit on the other, occurring at different times, and no special appropriation of payments, constituting the credits, has been made by either party, the successive payments and credits are to be applied in discharge of the items of debit antecedently due in the order of time in which they stand in the account. In other words, each item of payment or credit is applied in extinguishment of the earliest items of debt until it is exhausted."

We think that this rule should be applied to the case under consideration and that the amount received upon the draft had been paid over by the defendant to the Eldred Bank before it was notified that the draft had been altered.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

PETER R. WEILER, Appellant, *v.* GERTRUDE J. NEMBACH, Respondent.

An action to compel the determination of a claim to real property is not maintainable against an infant.

The exception of infants and certain other classes of persons in the provision of the Code of Civil Procedure (§ 1638), authorizing such an action, is not repealed or affected by the provision (§ 1686), declaring that any action specified in the title containing it "may be maintained by or against an infant in his own name," etc. This provision does not give a right of action, but only provides that an action may be maintained by or against an infant where the right of action is given by other provisions of the title.

General provisions or the provisions of a general act do not repeal special provisions or a special act, unless the intent to so repeal is expressed or manifested.

Reported below, 47 Hun, 166.

(Argued March 11, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 23, 1888, which reversed an order overruling a demurrer to the complaint and directing the entry of an interlocutory judgment in favor of plaintiff, and the interlocutory judgment entered upon said order.

The nature of the action and facts are sufficiently stated in the opinion.

John D. Townsend for appellant. The court had jurisdiction of defendant's person. (Code Civil Pro. §§ 1638, 1686; tit. 2, chap. 5, 3 R. S. §§ 1, 3; tit. 7, § 12; tit. 2, chap. 8, §§ 1, 3; art. 2, tit. 3, chap. 8, part 3, R. S. § 43.) Where the provisions of two statutes are manifestly repugnant, the earlier enactment will be modified or repealed by the later one. (*Thompson v. Thompson*, 55 How. 494.) Passing a law inconsistent with some provision of a pre-existing statute is an implied repeal of the first, so far as those provisions are incompatible with each other. (*Burdick v. Phillips*, 17 Week. Dig. 440.)

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L. C. Waehner for respondent. The bringing of an action to determine claims to real property against an infant is prohibited. (Code of Civil Pro. §§ 1686, 3355; Potter's Dwarris on Statutes, 194, 197, 202 [ed. 1871].) The court will not favor the repeal of statutes by implication, even when it is a question of an earlier and a later enactment. (9 Barb. 260.) And when both the latter and former statutes can stand together both will stand, unless the former is expressly repealed or the legislative intent to repeal it is very manifest. (Dwarris, 197; *People ex rel. Kingsland v. Palmer*, 52 N. Y. 83; *Hawkins v. Mayor, etc.*, 64 id. 188.)

HAIGHT, J. This action was brought to compel the determination of a claim to real property. The defendant is an infant. The question is as to whether the court has jurisdiction of the person of the defendant. The provisions of the Code under which the action is brought provide that "where a person has been, or he and those whose estate he has, have been for three years in the actual possession of real property, claiming it in fee or for life, or for a term of years not less than ten, he may maintain an action against any other person, except a person who is, when the action is commenced, an infant, an idiot, a lunatic, an habitual drunkard, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, to compel the determination of any claim adverse to that of the plaintiff, which the defendant makes, to any estate in that property in fee or for life, or for a term of years not less than ten, in possession, reversion or remainder. But this section does not apply to a claim for dower." (Code of Civ. Pro. § 1638.) No question is made but that under the provisions of this section, as it stands, the plaintiff cannot maintain the action. It is claimed, however, that the clause excepting infants has been repealed by section 1686 of the Code. That section is as follows: "Any action specified in this title may be maintained by or against an infant in his own name," etc. Section 3355 provides that, "for the purpose of determining the effect of the different provisions of this act

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with respect to each other, they are deemed to have been enacted simultaneously."

It, therefore, becomes our duty to construe them together so as to allow the provisions of both to stand, if the language of the different provisions is capable of such construction. In construing statutes the legislative intent must be our guide. Section 1638 is a codification, with some amendments, of the Revised Statutes upon the subject. Under those statutes proceedings were authorized for the determination of claims to real estate which were commenced by the service of a notice, but such notice could only be served upon persons who at the time were of full age, and not insane or imprisoned on any criminal charge or conviction. (3 R. S. [6th ed.] 580, § 3.) And in the case of *Bailey v. Briggs* (56 N. Y. 407), it was held that an action for the determination of claims to real property is not authorized against infant defendants under the provisions of the statute. The fact that the exceptions contained in the statutes were incorporated into the provisions of section 1638 of the Code, would seem to indicate an intention upon the part of the legislature to continue them, unless a different intention is expressly stated or clearly inferred from the other provisions of the act. It must be borne in mind that the repeal of a statute by implication is not favored in the law, and when both the latter and former statute can stand together, both will stand, unless the former is expressly repealed or the legislative intent to repeal it is very manifest. (*People ex rel. Kingsland v. Palmer*, 52 N. Y. 83-88.) Is such intention expressed or clearly inferred from the provisions of section 1686? That section is speaking of all the cases embraced in the title of which it is a part, in many of which actions may be brought by or against infants. As to all such cases the provisions of the act clearly apply. But if we are to construe it in connection with the former section of the same title, we must hold that it has no application to actions provided for in the title wherein the express provisions authorizing such actions, except those under age at the time the action was brought. Section 1686 of the Code does not give a right of

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action. It only provides that it may be maintained by or against an infant where the right of action is given by other provisions of the title, and under section 1638 no right of action is given for the determination of a claim to real property against an infant defendant.

Again, the title of the Code under consideration contains nine articles; one for the recovery of real property; others for partition, dower, foreclosing of a mortgage, for waste, for nuisance, and so on, among which is the article to compel the determination of a claim to real property. The last article is headed by these words: "Provisions applicable to two or more of the actions specified in this title." Then follow general provisions, among which is section 1686. Section 1638 is the first section appearing under the article providing for actions to compel the determination of claims to real property, and when its provisions were framed and adopted, attention was, of necessity, called to the just requirements of that form of action. The provisions of section 1686, being general and made applicable to many causes of actions, the attention of the legislature would not necessarily be so sharply drawn to the requirements of any one of the particular forms of action provided for. We think the provisions are consequently brought within the general rule, which is, that general provisions or the provisions of a general act, do not repeal special provisions or a special act, unless the intent to so repeal is expressed or was manifestly intended. (*In the Matter of Evergreens*, 47 N. Y. 216.)

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

**THE EMPIRE STATE TYPE FOUNDING COMPANY, Appellant, v.
HUGH J. GRANT, Sheriff, etc., Respondent.**

Where a sale of personal property is made on condition that the stipulated price shall be paid on delivery, title does not pass until payment is made, unless the vendor waives the condition.

Under such a contract delivery and payment are simultaneous or concurrent acts, and although the articles may have been actually delivered, the delivery is not absolute unless the vendor has, by subsequent act, waived the condition of payment.

Where a contract for the sale of personal property does not provide, in express terms, that payment shall be made on delivery, or that payment and delivery shall not be concurrent the intent of the parties must control; and if from the acts of the parties and the surrounding circumstances it can be inferred that it was intended that payment and delivery should be concurrent acts, the title will be deemed to have remained in the vendor until the condition of payment is complied with.

The question of intent in such case is one of fact.

In an action to recover possession of personal property, it appeared that plaintiff contracted to sell to one T. the property in question, consisting of two printing presses, with the necessary shafting, together with a quantity of type and other printers' supplies, for \$1,100.95, \$500 to be paid in cash and a mortgage on the property to be given by T. for the balance. Plaintiff at once commenced to put up the shafting, set the presses and deliver the type and other materials. When the work was about half done plaintiff demanded the cash payment agreed upon. T. paid \$250 and plaintiff continued putting the presses in working order, transferring the type and other materials. Immediately after the completion of the work plaintiff's president went to T.'s office to collect the balance and there learned that T. had absconded. On the same or the next day defendant, as sheriff, levied on the goods under an attachment against T. Plaintiff's president immediately asserted to the attaching creditor that it had not parted with possession of the property, and upon refusal to surrender it, brought this action. At the close of plaintiff's case the court directed a verdict for defendant. *Held*, error; that the question as to whether there was a delivery sufficient to pass title should have been submitted to the jury; also that by the payment of the \$250 T. did not, if title remained in plaintiff, acquire an interest to that amount, which was subject to attachment.

Where a vendor of chattels is ready and offers to perform on his part and the purchaser neglects and refuses to perform, he cannot recover back the partial payments he has made.

E. S. T. F. Co. v. Grant (44 Hun, 484) reversed.

(Argued March 6, 1889; decided March 26, 1889.)

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APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 14, 1887, which affirmed a judgment in favor of defendant, entered upon a verdict directed by the court.

This was an action of replevin.

The material facts are stated in the opinion.

George W. Stephens for appellant. Where property is to be paid for on delivery the title remains in the vendor until either the payment is made or waived. (*Hammett v. Linne-mann*, 48 N. Y. 399, 405; *Parke v. Baxter*, 86 id. 586; *Leven v. Smith*, 1 Denio, 571; *Russel v. Minor*, 22 Wend. 659; *Osborne v. Gantz*, 60 N. Y. 540; *Dows v. Kidder*, 84 id. 121, 127; *Mason v. Decker*, 72 id. 595, 599; *Whitney v. Eaton*, 15 Gray, 225; *Adams v. O'Connor*, 100 Mass. 515; *Farlow v. Ellis*, 15 Gray, 229; Benjamin on Sales [4th Am. ed.] §§ 336-350; *Thorp v. Fowler*, 57 Iowa, 541.) The contract itself, as testified to, and by necessary implication, contained an agreement that the title was not to pass until payment was made in the manner agreed upon. (*Stow v. Tift*, 15 Johns. 458.) There was no waiver in the present instance. (Hare on Contracts, 449; *Mount v. Lyon*, 49 N. Y. 552; *Owens v. Weedman*, 82 Ill. 409; *Henderson v. Lanek*, 9 Hains, 359; *Paul v. Read*, 52 N. H. 136.) The fact that the vendee had paid \$250 while the delivery was in progress does not affect the title. (*Fickett v. Brice*, 22 How. Pr. 194; *Frey v. Johnson*, Id. 316; *Hoyt v. Hall*, 3 Bosw. 44; *Champlin v. Rowley*, 13 Wend. 258; 18 id. 187; *Mead v. De Golyer*, 16 id. 632; *Paige v. Ott*, 5 Denio, 406; *McKnight v. Dunlop*, 4 Barb. 36; *Mount v. Lyon*, 49 N. Y. 552.) Plaintiff was not under any obligation to offer to return this money. (*Herring v. Hoppock*, 15 N. Y. 409, 411, 412; *Campbell P. P. Co. v. Walker*, 43 Hun, 449; *Humeston v. Cherry*, 23 id. 141; *Haviland v. Johnson*, 7 Daly, 297; *Angier v. Taunton Paper Co.*, 1 Gray, 621; *Sergeant v. Metcalf*, 5 id. 506; *Colcord v. McDonald*, 128 Mass. 470; *Carter v. Kingham*,

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103 id. 513; *Knox v. Perkins*, 15 Gray, 529; *Hart v. Carpenter*, 24 Conn. 427; *Brown v. Haynes*, 52 Maine, 578; *Everett v. Hall*, 67 id. 497; *Duke v. Shackelford*, 56 Miss. 552; *Fleck v. Warner*, 25 Kan. 492; *Latham v. Sumner*, 89 Ill. 233; *Singer Mfg. Co. v. Treadway*, 4 Brad. 57; *Monroe v. Reynolds*, 47 Barb. 574, 579; *Ketcham v. Everts*son, 13 Johns. 359; *Ellis v. Horkens*, 14 id. 363; *Simon v. Kaleske*, 6 Abb. [N. S.] 224.) A creditor gets no better title than his debtor. (*Corner v. Cunningham*, 77 N. Y. 391.)

Cockran & Clark for respondent. The proof adduced by the plaintiff showed that the title to the property and also the right of possession was in Tremelling, and, therefore, the levy of the sheriff was lawful, and the plaintiff could not maintain a replevin suit. (*Sharp v. Whitherhall*, 3 Hill, 576; *Wood v. Orser*, 25 N. Y. 348.) If a chattel mortgage had been given by Tremelling the sheriff would still have been bound to levy upon the property. (*Carpenter v. Town*, Lalor, 72; *Redman v. Hendricks*, 1 Sandf. 32.; *Goulet v. Asseler*, 22 N. Y. 225.) The direction of the court to the jury to fix the value of the goods at the amount stated in plaintiff's affidavit and in the complaint was proper. (*Campbell v. Woodworth*, 20 N. Y. 499; *Remsen v. Buck*, 34 id. 383; *McCurdy v. Brown*, 1 Duer, 101; *Tiedman v. O'Brien*, 4 J. & S. 539.) The judgment of the court as rendered was the only judgment that could legally be given. (*Townsend v. Bargy*, 57 N. Y. 665; *Allen v. Judson*, 71 id. 77; *Parish v. Wheeler*, 22 id. 494.)

PARKER, J. In March, 1886, the plaintiff, by its president, agreed to sell to one Guy Tremelling two printing presses, with the necessary shafting, together with a quantity of type and and other printers' supplies, for the sum of \$1,100.95, payment to be made as follows: Five hundred dollars to be paid in cash, and a chattel mortgage, embracing all the property sold, to be given by Tremelling for the balance. The plaintiff at once commenced to put up the shafting, set the presses and deliver the type and other materials. When the work was about

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half done, the clerk of the plaintiff was sent to Tremelling to collect the cash agreed to be paid. Tremelling paid \$250 and the plaintiff went on with the work of putting the presses in working order, transferring the type and other materials, in which work the plaintiff was engaged between fifteen and sixteen days. Immediately after the materials had been put in and work completed, the president of the plaintiff went to the office of Tremelling to receive the payment agreed upon, and learned that Tremelling had absconded. On the same day, or the day following, the defendant, as sheriff of the city and county of New York, under and by virtue of a warrant of attachment regularly issued against the property of Tremelling, levied upon the effects in question. The plaintiff thereupon commenced this action to recover possession of the property. At the close of the plaintiff's case the defendant moved the court to direct a verdict for the defendant. The plaintiff asked that the case be submitted to the jury. The court denied the plaintiff's request and directed a verdict for the defendant, the plaintiff duly excepting.

We think that the facts proven did not warrant the trial court in holding, as a matter of law, that the title to the property had passed from plaintiff to Tremelling, and, therefore, the disposition made of the case was error. It is too well settled to require the citation of authority, that where a sale of personal property is made upon condition that the stipulated price shall be paid upon delivery, title does not pass until payment made, unless the vendor waive the condition. Under such a contract, delivery and payment are simultaneous or concurrent acts by the seller and buyer; and although the articles may have been actually delivered into the possession of the vendee, the delivery is held to be conditional and not absolute, provided the vendor has not by subsequent acts waived the condition of payment. If, then, the agreement between the plaintiff and Tremelling had provided, in express terms, that payment be made on delivery (no proof having been offered tending to show a subsequent waiver of such condition), it would have been the duty of the court to hold,

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as a matter of law, that the title to the chattels still remained in the plaintiff.

The agreement, however, did not provide, in express terms, that payment should be made on delivery. Neither did it provide that payment and delivery should not be concurrent. The rule in such case is that the intent of the parties must control. If it can be inferred from the acts of the parties and the circumstances surrounding the transaction that it was the intent that delivery and payment should be concurrent acts, the title will be deemed to have remained in the vendor until the condition of payment is complied with. (Benj. on Sales [Am. ed.] § 330 and notes; *Leven v. Smith*, 1 Denio, 571; *Hammet v. Linneman*, 48 N. Y. 399; *Smith v. Lynes*, 5 id. 41; *Parker v. Baxter*. 86 id. 586; *Russell v. Minor*, 22 Wend. 659.)

The question of intent is one of fact, not of law. It is for the jury, not for the court to pass upon. (*Hall v. Stevens*, 40 Hun, 578; *Hammet v. Linneman*, 48 N. Y. 399.)

It appears that the defendant stipulated to pay for the materials sold, \$500 in cash and give a chattel mortgage on all of the property for the balance; that while the materials were being delivered, the plaintiff demanded and received \$250 on account of cash payment; that immediately after the plaintiff had performed his part of the contract, its president went to Tremelling's office to receive payment and found that he had absconded, and the next day the plaintiff's president asserted to the attaching creditor that he had not parted with the possession of the goods. These facts, together with all the circumstances surrounding the transaction under the authorities cited, should have been submitted to the jury, under proper instructions, to enable them to determine whether the title passed to Tremelling or remained in the plaintiff. It is suggested, in one of the opinions of the court below, that Tremelling had acquired an interest to the extent of \$250 in the property, which was subject to sale under the attachment. We do not concur in that view. If it be determined that the title to the property remains in the plaintiff, the case falls

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within the established rule that where a vendor of chattels, when the period of performance arrives, is ready and offers to perform on his part, and the purchaser neglects and refuses to perform, for any reason, he cannot recover back the partial payments he has made. (*Monroe v. Reynolds & Upton*, 47 Barb. 574; *Humeston v. Cherry*, 23 Hun, 141.)

The judgment of the General Term and of the Circuit should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

**EUGENE CULLEN, an Infant, by Guardian, etc., Respondent, v.
NATIONAL SHEET METAL ROOFING COMPANY, Appellant.**

Plaintiff was in the employ of defendant, engaged in working a press used in stamping tin plates for roofing. The press had two dies, between which the plates were placed. While so engaged plaintiff's hand was caught and crushed between the dies. In an action to recover damages for the injury plaintiff claimed, and his evidence tended to show, that the press was out of repair, so that the clutch, which was designed to hold the upper die in place until the operative by the pressure of his foot on a treadle released it and let it down upon the tin plate on the lower die, would occasionally fly out of position letting the die down without pressure on the treadle, and that this happened at the time of the injury. It appeared by plaintiff's testimony that he had been operating this press for about a year; that three times before the accident the upper die had thus descended, the last time about an hour previous; also, that once before plaintiff's hand was caught between the dies and the thumb injured. A stick was provided for moving the plates between the dies, and a notice was posted upon the press forbidding employes "under any circumstances" from placing their hands or fingers under the press. Defendant's superintendent and foreman had both, on different occasions, reproved plaintiff for putting his fingers between the dies and warned him of the danger, but he was accustomed to disregard the rule, his excuse being that he could work faster with his fingers than with the stick. On the occasion of the accident the plate stuck to the lower die and he was using his fingers instead of the stick to remove it. Held, that plaintiff's negligence directly contributed to the injury, and a refusal to nonsuit was error.

(Argued March 11, 1889; decided March 26, 1889.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict and an order denying a motion for a new trial.

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

The facts, so far as material, are stated in the opinion.

Roscoe H. Channing for appellant. If the existence of the alleged defect, and that it was the direct cause of the accident, were conceded, still there was a total failure on the part of the plaintiff to prove the first essential element of his cause of action, to wit, the negligence of the defendant, and the complaint should have been dismissed. (*Reardon v. N. Y. C. C. Co.*, 51 Super. Ct. 134; *Payne v. Forty-second St. R. R. Co.*, 40 id. 8; *Bauler v. N. Y. & H. R. R. Co.*, 59 N. Y. 356; *De Graff v. N. Y. C. R. R. Co.*, 76 id. 125; *Panzar v. T. F. I. M. Co.*, 99 id. 318; *Rose v. B. & A. R. R. Co.*, 58 id. 217, 219; *Scoville v. Erie R. Co.*, 3 Week. Dig. 114; *Kelly v. C. G. Co.*, 17 id. 408; *Leonard v. Collins*, 70 id. 90; *Kunz v. Stuart*, 1 Daly, 43; *Nelson v. Dubois*, 11 id. 128; *McMillan v. S. R. R. Co.*, 20 Barb. 449; Sherman & R. on Neg. § 99; *Toomey v. R. R. Co.*, 3 C. B. 146.) At most, the jury could only conjecture that the defendant might have been wanting in the care and caution proper to be exercised in such a case, and, if so, the case should have been withheld from the jury. (*Avery v. Bowden*, 6 E. & B. 973, 974; *McMahon v. Leonard*, 6 H. of L. Cas. 970, 993; *Bauler v. N. Y. & H. R. R. Co.*, 59 N. Y. 336.) Plaintiff's co-operative negligence preceding the accident, and irrespective of his negligence in placing his hands under the press at the happening of the accident, was, as shown by the uncontroverted evidence, an element in producing his injuries; and his complaint should have been dismissed on that ground, even if the negligence of the defendant and the existence of the alleged defect, and its having been one of the direct causes of the accident

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were all beyond question. (*Weber v. N. Y. C. R. R. Co.*, 58 N. Y. 455; *Shaw v. Sheldon*, 3 N. Y. State Rep. 679; *Gibson v. Erie R. Co.*, 63 N. Y. 449; *Prenate v. Union Iron Co.*, 23 Hun, 528; *De Graff v. N. Y. C. R. R. Co.*, 76 N. Y. 125; *Davies v. D. & M. R. R. Co.*, 20 Mich. 185; *Baker v. A. R. R. Co.*, 23 Alb. L. Jour. 96; *Ballon v. C. & N. W. R. R. Co.*, 26 id. 137; *Marsh v. Chickering*, 101 N. Y. 396.) The injury was caused solely by plaintiff's negligence. (*Stackus v. N. Y. C. R. R. Co.*, 79 N. Y. 464; *Borst v. L. S. & M. R. Co.*, 4 Hun, 346; 66 N. Y. 63; *Spooner v. B. C. R. R. Co.*, 54 id. 239.) Defendant should not be adjudged liable on a mere probability that the machine was defective, but there should be in the facts shown some element of moral certainty and exclusion of reasonable doubt on that point, as well as on the point of defendant's negligence. (*Payne v. Forty-second St. R. R. Co.*, 40 Super. Ct. 8, 13.)

J. W. Covert for respondent. The notice or printed rule was not conclusive on the question of plaintiff's negligence. (*D., etc., R. R. Co. v. Slattery*, L. R., 3 App. Cas. 1165; *Hayes v. B. & D. Mfg. Co.*, 41 Hun, 407.) To justify the court in directing a verdict or granting a nonsuit in any case, upon the facts, the evidence must be undisputed, or so certain and convincing that no reasonable mind could come to any other conclusion. (*Bagley v. Bowe*, 105 N. Y. 171, 179; *Kain v. Smith*, 89 id. 375.) It was the duty of the defendant to exercise due care in furnishing a suitable and safe machine for the use of the plaintiff and to keep it in repair, and its neglect of these duties was negligence. (*Cone v. D., L. & W. R. R. Co.*, 81 N. Y. 206; *Kain v. Smith*, 89 id. 375; *Panzar v. Tilly Foster Co.*, 101 id. 520; *Stringham v. Stewart*, 100 id. 516; *Benzing v. Steinway*, 101 id. 547.) The plaintiff was not guilty of contributory negligence, as a matter of law, in continuing to work upon the machine after knowledge that it was out of repair. (*Stackus v. N. Y. C. R. R. Co.*, 79 N. Y. 464; *Kain v. Smith*, 89 id. 375; *Bagley v. Bowe*, 105 id. 171, 179; *Palmer v. Deering*, 93 id. 7; *Bas-*

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sett v. Fish, 75 id. 304; *Healy v. Ryan*, 25 Week. Dig. 23.) The court will take into consideration the youth of the injured boy; that he was directed by his foreman to continue his work until quitting time; that he (the foreman) promised then to repair the machine, and that the boy continued his work, relying upon the promise of the foreman. (*Kain v. Smith*, 89 N. Y. 375; *R. R. Co. v. Fort*, 17 Wallace, 553; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521; *Mehan v. S., etc., R. Co.*, 73 id. 585; *Hawley v. N. Y. C. R. R. Co.*, 82 id. 370; *McMahon v. Port Henry Iron Co.*, 24 Hun, 48; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Hough v. Railway Co.*, 100 U. S. 213.) It is no defense to the defendant that the negligence of a fellow-servant co-operated to produce the injury. The duty of the master to provide safe and suitable machinery and to keep it in proper repair is positive, and cannot be delegated. (*Cone v. D., L. & W. R. R. Co.*, 81 N. Y. 206; *Stringham v. Stewart*, 100 id. 516; *Fuller v. Jewett*, 80 id. 46.)

FOLLETT, Ch. J. When the plaintiff was injured the defendant was engaged in preparing tin plates for roofing. The plates were prepared, in part, by a stamping press which had two dies, an upper and lower one, fourteen inches long and twenty inches wide. The lower die was immovable and the upper one movable, having a vertical stroke of about two inches. When the upper die was raised, for the purpose of admitting a plate, it was stopped and held in position by a clutch which was held in place by force supplied by a strong spiral spring, the action of which was controlled by the foot of the operative applied to a treadle. When the operative had placed the plate on the lower die in proper position for stamping, he pressed his foot on the treadle, compressed the spring which released the clutch and the upper die was forced by the power of steam down on the plate lying on the lower die.

At the date of the injury, April 17, 1886, the plaintiff was seventeen years of age, and had been employed by the defendant for two years, and for one year had operated this press,

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and was familiar with its working and its dangers. At the date named, the fingers of the plaintiff's right hand were caught between and crushed by the dies, for which injury he seeks to recover compensation, upon the ground that the defendant negligently suffered the press to be out of repair. The only defect suggested by the evidence is that the clutch which held the upper die in suspension was not held securely in its place and would fly back, or out of position and permit the upper die to descend upon the lower one without the application of the usual force to the treadle, which defect the plaintiff asserts caused the injury. The plaintiff testified that on, at least, three occasions, before he was injured, the upper die was accidentally forced down upon the lower one without the application of force to the treadle. The first occasion was about two weeks before he was injured, and he reported the fact to the foreman who, after some examination, reported the press in good order; that the second occasion was on the day before he was injured, which he reported to the foreman, who again examined the press and reported it all right. The third occasion was about two hours before the plaintiff was injured. He again reported to the foreman that the press was out of order and he promised to fix it after the work for the day was done. The plaintiff continued to operate the press until about half past four o'clock, at which time, while engaged in trying to push from the press a plate of tin with his fingers instead of a stick, the upper die accidentally descended and crushed the fingers of his right hand. The plaintiff testified that he did not know wherein the press was out of order; and no witness was called who did know. Three witnesses were called by the defendant, who testified that they saw the press about the time of the accident and that it was not out of repair or defective. The plaintiff testified that a stick was provided for moving the plates between the dies, and that there was posted on his and all of the presses a printed notice in these words: "*Employees are forbidden, under any circumstances, to put their fingers or hands under these presses.*"

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The plaintiff also testified that defendant's superintendent Cooper, and its foreman Rakestraw, had, on different occasions, reproved him for putting his fingers between the dies and warned him of the danger, and that he was accustomed to disregard the rule, and that on a former occasion one of his thumbs was injured between the dies. The only excuse given by the plaintiff for his frequent violation of the rule was that he was required to stamp thirty-five boxes of tin plates for a day's work, and that he could work faster with his fingers than with a stick, and that on the occasion of the accident the plate stuck to the lower die, which he could more readily remove with his fingers than with a stick. A co-employe testified that he and the plaintiff exchanged works two or three hours before the accident, and that the plaintiff told him to work rapidly as he wished to finish his thirty-five boxes by half past four and leave the factory. This the plaintiff did not dispute, and it is suggestive of a possible cause for the accident. According to the plaintiff's evidence, he voluntarily put his hand between the dies, in violation of the well-known printed rule and of the oral instructions of the superintendent and of the foreman, and also in the face of his personal experience of the danger of such conduct. We fail to find the slightest evidence that this act was necessary or excusable, and it was certainly not done in ignorance of the danger, if it is true that about two hours before the plaintiff was injured the upper die accidentally fell. He had been very recently warned of the danger of putting his fingers between the dies, and under such circumstances he was very negligent in not regarding the rule and the warning; and this negligence directly contributed to produce the injury complained of.

We think the trial court should have nonsuited the plaintiff upon the ground of contributory negligence. For this error the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

FRITZ A. ANKERSMIT et al., Appellants, *v.* SIMON TUCH, as Assignee, etc., Impleaded, etc., Respondent.

In an action to recover possession of certain goods alleged to have been purchased by M., defendants' assignor, of plaintiffs by means of false and fraudulent representations and with the intent not to pay therefor, plaintiff gave evidence tending to show the making of the false representations charged and that the sale was induced thereby. M., as a witness for defendant, testified that he had never made any such representations. Upon cross-examination he was asked if he had not made representations, similar to those charged, to other persons named, of whom he had purchased goods at about the same time as the purchase in question; this he denied. Held, that it was competent for plaintiff to prove by the persons named that M. did make such representations to them at the time of the purchases, and that the exclusion of the testimony was error; that the testimony was not only competent as evidence in chief, but was admissible for the purpose of contradicting M.'s testimony and impeaching his credibility, and it was not discretionary with the court to exclude it.

A party has the right to impeach or discredit the testimony of his opponent; such evidence is always competent. He may also contradict a witness against him as to any matters upon which the witness has given evidence in chief, provided it is not collateral to the issue.

If the testimony sought to be contradicted has reference to statements made to others, the attention of the witness should first be called to the time, place and person to whom the statement is claimed to have been made, and if denied, such person may then be called to contradict him. Reversed *sub nomine Ankersmit v. Bluxome* (48 Hun, 1).

(Argued March 13, 1889; decided March 26, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 28, 1888, which affirmed a judgment in favor of defendant, entered on a verdict and an order denying a new trial.

The nature of the action and the material facts are stated in the opinion.

Frederick P. Forster for appellants. Evidence impeaching Moeller's credibility was erroneously excluded. (*Winchell v. Winchell*, 100 N. Y. 159, 162, 164; *Romertze v. E. R. Nat. Bk.*, 49 id. 577; *People v. Schuyler*, 106 id. 308; *Homer v.*

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Everett, 91 id. 643, 644; *Sitterly v. Gregg*, 90 id. 687, 688; *Sparrowhawk v. Sparrowhawk*, 73 id. 591; *Schell v. Plumb*, 55 id. 599; *Sloan v. N. Y. C., etc.*, 45 id. 127; *Rockwell v. Brown*, 36 id. 210, 211; *Chapman v. Brooks*, 31 id. 86, 87; *Wright v. Nostrand*, 94 id. 41; *Stape v. People*, 85 id. 393, 394; *Foster v. Newbrough*, 58 id. 481; *Patchin v. Astor M. Ins. Co.*, 13 id. 268.) For the purpose of impeaching Moeller the evidence was not competent in chief; it could only be offered at the time it was. (*Gaffney v. People*, 50 N. Y. 423; *Hart v. H. R. B. Co.*, 84 id. 60; *Romertze v. E. R. Nat. Bk.*, 49 id. 577; *Pendleton v. Empire Stone D. Co.*, 19 id. 13; *Stacy v. Graham*, 14 id. 492; *Sloan v. N. Y. C., etc.*, 45 id. 127; *Hubbard v. Briggs*, 31 id. 536; *Newcomb v. Griswold*, 24 id. 301.) The fact that Moeller was the assignor of Tuch makes no difference, as a party must be impeached in the same manner as any other witness. (*Varona v. Socarras*, 8 Abb. Pr. 302; *Winchell v. Winchell*, 100 N. Y. 159.) The impeaching evidence was not collateral. (*Kinner v. D. & H. C. Co.*, 52 Super. Ct. 162; *Winchell v. Winchell*, 100 N. Y. 159, 164; *Foster v. Newbrough*, 58 id. 481; *Hillard on. Rem. for Torts*, 475; *Butler v. Collins*, 12 Cal. 457; *Hubbard v. Briggs*, 31 N. Y. 538.) Fraud and intent not to pay for the tobacco was established as a matter of law. (*People v. Cook*, 8 N. Y. 75; *Lomer v. Meeker*, 25 id. 362.) Moeller was bound to disclose his insolvency to Duys, and his omission to do so was fraudulent as a matter of law. (*Durall v. Haley*, 1 Paige, 493; *Chapman v. Lathrop*, 6 Cow. 117, 118; *Wright v. Brown*, 67 N. Y. 1, 5; *Donaldson v. Farwell*, 93 U. S. 633; *Van Neste v. Conover*, 20 Barb. 547; *Carpenter v. Roe*, 10 N. Y. 227; *Reade v. Livingston*, 3 Johns. Ch. 481; *Bayard v. Hoffman*, 4 id. 450; *People v. Briggs*, 47 Hun, 268; *Harris v. White*, 81 N. Y. 547, 548; *Wyld v. R. R. Co.*, 53 id. 164; *Phelps v. Dorland*, 103 id. 913; *Sutter v. Van Derveer*, 47 Hun, 367. The defendant by moving to dismiss the complaint and not asking to go to the jury waived the right to go to the jury. (*Muller v. McKesson*, 73 N. Y. 198; *O'Neil v. James*, 43 id. 85; *Provost v. McEnroe*, 102 id. 650; *Fargo*

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v. *Milburn*, 100 id. 96; *Herendeen v. De Witt*, 49 Hun, 54.) There was, therefore, a question of law for the court to decide. It is error to submit a question of law to the jury. (*Brady v. Cassidy*, 104 N. Y. 155; *Dwight v. Ins. Co.*, 103 id. 350; *Glaciis v. Black*, 67 N. Y. 568.) The direction of a verdict is a matter of absolute right. (*Tooker v. Arnoux*, 76 N. Y. 397.)

Alfred P. W. Seaman and *E. E. West* for respondent. A party is bound to exhaust all his testimony in support of his issue, and to introduce all his evidence before he closes. (*Hastings v. Palmer*, 20 Wend. 225; *Ford v. Niles*, 1 Hill, 301; *Rex v. Stimpson*, 2 Carr & P. 415; *Silverman v. Freeman*, 3 E. D. Smith, 322; *Marshall v. Davies*, 78 N. Y. 420.) The evidence was admissible on plaintiffs' case, as a matter of right, but its admission in rebuttal was in the "discretion of the court, from the exercise of which discretion no appeal lies." (*Marshall v. Davies*, 78 N. Y. 420.) The testimony was properly excluded because it was not admissible to impeach defendant's witness. (*Carpenter v. Ward*, 30 N. Y. 243; *Stokes v. People*, 53 id. 165; *People v. Ware*, 17 Week. Dig. 115; 72 N. Y. 653; *People v. Cox*, 21 Hun, 47; 83 N. Y. 610; *Atty.-Gen. v. Hitchcock*, 1 Exch. 91.) Plaintiffs neglected to produce evidence of contemporaneous representations before they rested, when competent, and when they attempted to prove them on cross-examination of defendant's witness they made the witness their own for that purpose, and being disappointed in the result, they should not be permitted to impeach the testimony they themselves brought out. (*People v. Cox*, 21 Hun, 47; *Pollock v. Pollock*, 71 N. Y. 137; *Thompson v. Blanchard*, 4 id. 303; 5 Denio, 112; *Nicholas v. White*, 85 N. Y. 531.) The jury are the sole judges of the facts, and their verdict will not be disturbed unless it is so clearly against the weight of evidence as to indicate passion, prejudice, mistake or corruption, or unless the verdict is so against a striking preponderance of evidence that a common exercise of judgment demands its reversal. (*Morse v. Sherrill*, 63 Barb. 21; *Roosa v. Smith*, 17 Hun,

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138; *Gray v. Railroad Co.*, 48 Super. Ct. [J. & S.] 121; *Gesheide v. Quirk*, 5 Civ. Pro. R. [Browne] 38; *Beckwith v. R. R. Co.*, 64 Barb. 229; *Godfrey v. Moser*, 66 N. Y. 250.)

HAIGHT, J. This action was brought to recover the possession of eight bales of Sumatra tobacco purchased by the defendant's assignor, as is alleged, by means of false and fraudulent representations as to his solvency, and with the intent not to pay therefor. Upon the trial the plaintiffs gave evidence tending to show that, before making the sale of the goods in question, the defendant's assignor represented and stated that he was solvent and worth \$20,000; that his wife had \$10,000, which was in the stock at the risk of the business. After the plaintiffs had rested, the defendant's assignor was sworn as a witness for the defendant, and denied that he had made any such representations. Upon the cross-examination he was asked if he had not purchased goods at about that time of various individuals, among whom were Schroeder & Bon, and he testified that he had, but at the time of such purchase in August or September, 1885, Bon did not make any inquiry of him as to his financial condition, and that he did not say to Bon that he was solvent and worth \$20,000, and did not state to him that he had \$10,000 in his business from his wife, which was at the risk of the business. After he had rested, the plaintiffs called Bon as a witness, who testified that he sold the goods to the defendant's assignor in August or September, 1885, and that, at the time he made a statement as to his condition. The witness was then asked "Did he state to you that he was solvent; that he was worth \$12,000, and that the \$10,000 which he got from his wife was at the risk of the business?" This was objected to as immaterial, incompetent and not in rebuttal. The evidence was excluded and an exception taken by the plaintiffs.

The court at General Term held that the statement made to Bon and others was competent as evidence in chief, and that the plaintiffs, having rested without introducing it, left its subsequent admission discretionary with the trial court, and,

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consequently, that the exception to its exclusion was not well taken. It is doubtless true that the evidence was competent and could have been introduced by the plaintiffs as a part of their affirmative case for the purpose of showing an intent to cheat and defraud, and that their neglect to introduce it at that time deprives them of the right to make use of it as affirmative evidence. But a party has the right to impeach or discredit the testimony of an opponent, and such evidence is always competent. He may contradict the testimony of a witness as to any matters upon which he has been called to give evidence in chief, provided it is not collateral to the issue; if it has reference to statements made to others, his attention should first be called to the time, place and person to whom the statement is claimed to have been made, and if denied, such person may then be called to contradict him, thus discrediting his testimony as a witness. This is what the plaintiffs attempted to do, and we do not understand that it was discretionary with the trial court to exclude it.

In the case of *Winchell v. Winchell* (100 N. Y. 159), the action was to compel a specific performance of a verbal contract for the sale of land. The plaintiff, who was the father of the defendant, claiming that there had been such a part performance of the contract as to entitle him to relief in equity. He testified, among other things, to the payment of the purchase-money. The defendant, on his direct-examination as a witness in his own behalf, denied that he had ever received any payment upon the contract. On his cross-examination he denied that he had told any person, at any time, that his father had paid him for the land or any part of it. He was then asked whether he had not told Mr. Greenfield so at the time he tendered a deed of the land for execution by the defendant, and he answered the question in the negative. RAPALLO, J., in delivering the opinion of the court, says: "The objection that the evidence offered, at too late a stage of the trial to entitle the plaintiffs as matter of right, to introduce it, was not made and the court did not place its rejection on the ground that its admission was a matter of discretion. But, assuming that

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such discretionary power may now be set up, the evidence was clearly admissible in rebuttal for the purpose of contradicting the testimony of the defendant, to the effect that no payment had been made and impeaching his credibility." It appears to us that this case is controlling upon the question under consideration, and that the plaintiffs are, consequently, entitled to have the evidence, which was excluded, considered by the jury.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
WILLIAM E. BRIGGS et al., Appellants.

In an action brought by the dairy commissioner in the name of the People to recover the penalty imposed by the act of 1885 "to prevent deception in the sale of dairy products" (Chap. 183, Laws of 1885), for a violation of one of the provisions of the act (§ 7), which by the terms of the act (§ 21), does not apply "to any product manufactured or in process of manufacture at the time of the passage of this act;" it is not necessary for plaintiff to prove that the product in question was manufactured after the passage of the act; the burden is upon the defendant seeking the benefit of the exception to bring his case within it.

The complaint in such an action charged in one count both possession and sale of the prohibited article and violations of sections 7 and 8 of the act. At the opening of the trial defendants moved for a direction that plaintiff separate the allegations charging possession and sale so as to present them as separate and distinct causes of action, and that plaintiff be required to elect upon which one of such causes he would rely; also, to direct a separation of the cause of action based upon the provisions of section 7 from that founded on section 8. *Held*, that these motions were addressed to the discretion of the trial court, and its decision thereon was not reviewable here.

The court was requested, and declined, to charge the jury that they must be satisfied beyond a reasonable doubt of the violation by defendants before they could find against them. *Held*, no error.

Reported below, 47 Hun, 266.

(Argued March 14, 1889; decided March 26, 1889.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 23, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict and an order denying a motion for a new trial.

This action was brought by the dairy commissioner under the act (Chap. 183, Laws of 1885, § 19), to recover the penalty there fixed for alleged violations of sections 7 and 8 of the act.

The material facts are stated in the opinion.

Albert Reynaud for appellants. In an action for a penalty, by the state, under a criminal statute, the evidence for the People must establish the violation beyond reasonable doubt. (*U. S. v. Chaffe*, 18 Wall. 515, 545; *U. S. v. Brig Burdette*, 9 Pet. 682, 687; *The Mohler*, 21 Wall. 230; *White v. Comstock*, 9 Vt. 405; *Cooley Const. Lim.* 320; *Tift v. Griffin*, 5 Ga. 185; *Groesbeck v. Lesley*, 13 Mich. 329; *Thurtell v. Beaumont*, 1 Bing. 339; *Wilmet v. Harmer*, 8 C. & P. 695; *Chalmes v. Schackell*, 6 id. 496; *McConnell v. Del. & Ins. Co.*, 18 Ill. 228; *Lexington Ins. Co. v. Paver*, 16 Ohio St. 324; *Stradden v. Mulvane*, 17 id. 604; *Wonderly v. Nokes*, 8 Blackf. 589; *Bissel v. West*, 35 Ind. 54; *Tucker v. Call*, 45 id. 31; *Lauter v. McEwen*, 8 Blatchf. 495; *Ellis v. Lindley*, 38 Iowa, 461; *Fountain v. West*, 23 id. 1; *Polston v. See*, 54 Mo. 29; *Clark v. Dibble*, 16 Wend. 601; *Hopkins v. Smith*, 3 Barb. 592, 602; *Woodbeck v. Keller*, 6 Cow. 118; *Berckmans v. Berckmans*, 17 N. J. Eq. 453; *Taylor v. Morris*, 22 id. 606; *Steinman v. McWilliams*, 6 Penn. St. 170; *Gorman v. Sutton*, 32 id. 247; *Coulter v. Stewart*, 2 Yerg. 225; *Freeman v. Freeman*, 31 Wis. 235; *Mix v. Woodward*, 12 Conn. 262, 288; *Warner v. Comm.*, 2 Va. Cas. 105; *Dwinels v. Aikin*, 2 Tyl. 75; *Stephens Dig. Ev.* 98.) Proof beyond doubt is required even in actions between private parties. (Taylor on Ev. 97a; Bishop on Mar. and D. § 844; Stevens' Ev. art. 94; 2 Greenl. on Ev. §§ 408, 426; 2 Starkie on Slander, 100, 101; Cooke on Def. 164, 165; Townshend on

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Slander, § 404; 2 Leigh Nisi Prius, 1239; 2 Arch. Nisi Prius, 284; 2 Stephen's Nisi Prius, 2084, 2252, 2253; Best on Right to Begin, 51, note 2; 1 Hill on Torts, § 46; 2 Add. on Torts, § 1163; 1 Am. Lead. Cas. 164, 189; Wood on F. Ins. §§ 101, 504, 506; *Gants v. Vinard*, 1 Smith, 287; 1 Cart. 476; *Shoultz v. Miller*, 1 Smith, 395; 1 Cart. 554; *Landis v. Shanklein*, Id. 92; *Snails v. Butcher*, 2 id. 84; *Lauter v. McEwen*, 8 Blackf. 495; *McGlenery v. Keller*, 3 id. 488; *Offutt v. Earlywine*, 32 Am. Dec. 40; *Byrket v. Monohan*, 41 id. 212; *Tucker v. Call*, 45 Ind. 31; *Wilson v. Barnett*, Id. 163; *Polston v. See*, 54 Mo. 291; *Steinman v. McWilliams*, 6 Pa. 170-177; *Gorman v. Sutton*, 32 id. 247; *Darling v. Banks*, 14 Ill. 46; *Crandall v. Dawson*, 1 Gilman, 556; *Mix v. Woodward*, 12 Conn. 262; *Park v. Blackniston*, 3 Harr. 373-378; *Merk v. Gelzhaeuser*, 50 Cal. 631; *Newbit v. Statuck*, 58 Am. Dec. 706; *Sedley v. Blair*, Wright, 683; *Steele v. Phillips*, 10 Humph. 461; *Dwinels v. Aiken*, 2 Tyler, 78; *Clark v. Dibble*, 16 Wend. 601; *Hopkins v. Smith*, 3 Barb. 592-602; *Bissell v. Cornell*, 24 Wend. 354; *Stegall v. Stegall*, 2 Brock. 257; *Phillips v. Allen*, 2 Allen, 453; *Sullivan v. Kelly*, 3 id. 148; *Cross v. Cross*, 3 Paige, 139; *Hemmenway v. Towner*, 1 Allen, 209; *Van Aernam v. Van A.*, 1 Barb. Ch. 375; *Van Tassel v. N.*, 18 N. W. Rep. 328; *Baker v. State*, 47 Wis. 111; *Berckmans v. Berckmans*, 17 N. J. Eq. 453; *Freeman v. Freeman*, 31 Wis. 235; *Cooper v. Cooper*, 10 La. [O. S.] 249; *Edmonds' Appeal*, 57 Pa. 232; *Caton v. Caton*, 7 Eccl. & Mar. Cas. 15; *Purcell v. Purcell*, 4 H. & M. 507; *Mehle v. Lapeyrollerie*, 16 La. Ann. 4; *Henderson v. Henderson*, 88 Ill. 248; *McConnell v. Del. Ins. Co.* 18 id. 288; *Lexington v. Paver*, 16 Ohio, 334; *Pryce v. Security Ins. Co.*, 29 Miss. 276; *Buttman v. Hobbs*, 35 Me. 227; *Schultz v. Pacific Ins. Co.*, 2 Ins. L. J. 495; *Brooks v. Clayes*, 10 Vt. 37; *Riker v. Hooper*, 35 id. 457; *Mason v. Shay*, 3 Am. L. Rec. 435; *Barton v. Thompson*, 26 Am. Rep. 131; *Thayer v. Boyle*, 30 Me. 475; *Taylor v. Morris*, 22 N. J. Eq. 606; *Conover v. Van Mater*, 18 id. 481; *Poppleton v. Nelson*, 20 Rep. [Ore.] 151; *Phelipplace v. Sayles*, 4 Mass. 312; *Gould*

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v. Gould, 3 Story, 537; Hubbard v. Turner, 2 McLean, 510; McBee v. Fulton, 47 Md. 403; Ransom v. Christian, 51 Ga. 351; Ferguson v. Ferguson, 1 Sandf. 307; Richards v. Turner, 1 C. & M. 414; Smith v. Kay, 7 H. of L. Cas. 750; Hercules v. Hunter, 15 Ct. of Sess. Cas. 800; Richardson v. Canada West Co., 16 N. C. Com. P. 436; Kane v. H. Ins. Co., 39 N. Y. 699; Blaeser v. M. Ins. Co., 37 Wis. 38.)

William P. Quin for respondent. If the appellants claimed that the product sold by them had been manufactured, or was in process of manufacture on April 30, 1885, it was a defense which they were bound to plead and prove. (People v. Kibler, 106 N. Y. 324; People v. West, Id. 297; Harrison v. White, 81 id. 532; Fleming v. People, 27 id. 334; Schwab v. People, 4 Hun, 523.) This is a civil action and not a criminal prosecution. (Aberman v. Kall, 34 Hun, 126; People v. Hill, 44 id. 472; Hoyer v. Town, 59 Ill. 138; State v. Hading, 32 Wis. 663; Hitchcock v. Munger, 15 N. H. 105; 3 R. S. [Banks' 6th ed.] 768.) A preponderance of evidence is sufficient and the respondent was not obliged to prove the violation of the statute beyond a reasonable doubt. (Aeby v. Rapelye, 1 Hill, 9; Abbott's Trial Ev. 495, note 1; Johnson v. Agricultural Ins. Co., 25 Hun, 253, 254; New York & Brooklyn Ferry Co. v. Moore, 102 N. Y. 667 18 Abb. N. C. 119; Slocovitch v. Oriental Mutual Insurance Co., 108 N. Y. 66; New York Guar. and Ind. Co. v. Gleason, 78 id. 513; Hitchcock v. Munger, 15 N. H. 97; U. S. v. Brig Burdette, 9 Pet. 683; The Mohler, 21 Wall. 230, 231; Chaffee v. U. S., 18 id. 516; Lilenthal v. U. S., 97 U. S. 237, 239, 255, 264-268; 3 Greenl. Ev. [8th ed.] § 29; 1 Taylor Ev. [6th ed.] 372; 2 Whart. Ev. § 1245; Gordon v. Parmelee, 15 Gray [Mass.] 266-268, 413, 415; White v. Comstock, 6 Vt. 409; Kane v. Hibernia Ins. Co., 39 N. J. Law, 697, 699; Welch v. Jugenheimer, 56 Iowa, 11, 16; Cooper v. Slade, 6 H. L. 746; Hertell v. Beaumont, 1 Bing. 339; Chalmers v. Shackell, 6 C. & P. 479; Willmett v. Hamer, 8 id. 679; Kincade v. Bradshaw, 3 Ga. 63; Wonderly

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v. Noyes, 8 Blackf. 589; *Lewis v. Garretson*, 56 Iowa, 280; *Fountain v. West*, 23 id. 16; *Ellis v. Lindsley*, 38 id. 462; *Ellis v. Buzzell*, 60 Me. 214; *Sparry v. Wilcox*, 1 Metc. 269; *Folsom v. Brown*, 25 N. H. 123; *Lexington Ins. Co. v. Paver*, 16 Ohio, 331; *Lyon v. Fleahmann*, 34 Ohio St. 154; *Jones v. Greaves*, 26 id. 5; *Steinman v. Mc Williams*, 6 Penn. St. 177; *Gorman v. Sutton*, 32 Penn. 248; *S. M. F. Ins. Co. v. Usaw*, 112 id. 90; *Colter v. Stuart*, 2 Yerg. 225; *Mills v. Goodyear*, 4 Lea, 239; *Berckmans v. Berckmans*, 17 N. J. Eq. 455; *Smith v. Smith*, 5 Oreg. 186; *Blaiser v. M. M. M. Co.*, 37 Wis. 31; *Poertner v. Poertner*, 66 id. 648; *Freeman v. Freeman*, 31 id. 235; *McConnell v. D. M. S. Ins. Co.*, 18 Ill. 233; *Hall v. Barnes*, 82 id. 228; *Lewis v. People*, Id. 106; *Continental Ins. Co. v. Joeherieha*, 110 Ind. 60-65; *Etna Ins. Co. v. Johnson*, 11 Bush, 592; *Hoffman v. West*, 1 La. An. 219; *Rothchild v. Am. Cent. Ins. Co.*, 62 Mo. 361; *Simmons v. Ins. Co.*, 8 W. V. 498; *Mead v. Husted*, 52 Conn. 59; *Elliott v. Van Buren*, 33 Mich. 51; *Marsh v. Walker*, 48 Tex. 379; *Bradish v. Bliss*, 35 Vt. 329; *Whitman v. Bryant*, 49 id. 512; *Howlowitz v. Kass*, 23 Blatch. 398; *3,380 Boxes v. U. S.*, 9 Saw. 304; *Knowles v. Scribner*, 57 Me. 495; *Mills v. Goodyear*, 4 Lea, 238; 10 Am. Law Rep. 642.) There is no distinction between actions brought by the state and those instituted by individuals as to the rules of evidence. (*Lilienthal's Tobacco v. U. S.*, 97 U. S. 237; *3,380 Boxes v. U. S.*, 9 Saw. 304; *Lewis v. People*, 82 Ill. 106.) The motion to compel the separation of the allegations of the complaint into different counts, and require the respondent to elect as to the cause of action for possession of sale, was properly denied. (*Bowland v. People*, 25 Hun, 425-427; 90 N. Y. 678; *Bork v. People*, 91 id. 13; *Commonwealth v. Nichols*, 10 Allen, 199; *Everitt v. Conkling*, 90 N. Y. 646; *Walters v. Continental Ins. Co.*, 5 Hun, 343; 2 R. S. 480-482, §§ 1, 3, 10; *Allen v. Patterson*, 7 N. Y. 476; *People v. Tweed*, 63 id. 199, 201; *Longworthy v. Knapp*, 4 Abb. Pr. 117; *Goodrich v. People*, 19 N. Y. 574; *Osgood v. People*, 39 id. 449; *Hawker v. People*, 75 id. 490; *Gold-*

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berg v. Uiley, 60 id. 428; Laws of 1886, chap. 577, § 23; *People v. Briggs*, 39 Hun, 653.)

BRADLEY, J. The right to maintain this action is dependent upon the statute, which, at the time in question, provided that no person "shall render or manufacture out of any animal fat or animal or vegetable oils not produced from unadulterated milk or cream from the same, any article or product in imitation or semblance of or designed to take the place of natural butter or cheese produced from pure, unadulterated milk or cream of the same, nor shall he * * * mix, compound with, or add to milk, cream or butter, any acids or other deleterious substance or any animal fats or animal or vegetable oils not produced from milk or cream, with design or intent to render, make or produce any article or substance or any human food in imitation or semblance of natural butter or cheese, nor shall he sell, keep for sale, or offer for sale any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall be made or produced in this state or in any other state or country." (Laws of 1885, chap. 183, § 7.) And that "no person shall manufacture, mix or compound with or add to natural milk, cream or butter any animal fats or animal or vegetable oils, nor shall he make or manufacture any oleaginous substance not produced from milk or cream, with intent to sell the same for butter or cheese made from unadulterated milk or cream, or have the same in his possession, or offer the same for sale with such intent, nor shall any article, substance or compound so made or produced, be sold for butter or cheese, the product of the dairy. If any person shall coat, powder or color with annatto or any coloring matter whatever, butter or oleomargarine, or any compounds of the same, or any product or manufacture made in whole or in part from animal fats or animal or vegetable oils, not produced from unadulterated milk or cream, whereby the said product, manufacture or compound shall be made to resemble

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butter or cheese, the product of the dairy, or shall have the same in his possession, or shall sell or offer for sale or have in his possession any of the said products which shall be colored or coated in resemblance of or to resemble butter or cheese, it shall be conclusive evidence of an intent to sell the same for butter or cheese, the product of the dairy." (Id. § 8.) Each of the above sections also provided that the violation of its provisions should be a misdemeanor, punishable as therein mentioned. And the statute further provided that any person who should violate any of the provisions of those sections should, in addition to the fines and punishments therein prescribed, forfeit and pay a penalty of \$500, to be recovered in an action to be prosecuted by the dairy commissioner, in the name of the People of the state of New York. (Id. § 19.) And that such section 7 should not apply to any product manufactured or in process of manufacture at the time of the passage of the act. (Id. § 21.) This action was brought in the manner so provided, to recover the penalty for the alleged violation of the provisions of such statute, in that the defendants had in their possession, with intent to sell, and sold as butter, the product of the dairy, that which was not such, but came within the prohibition of the statute. And upon the trial evidence, upon the part of the plaintiffs, was given tending to prove that the defendants, on May 25, 1885, had in their possession, at their store in the city of New York, with intent to sell as butter the product of the dairy, a product which was not butter made from milk or cream of the same, but had been made out of some animal fat not produced by unadulterated milk or cream and which was colored by some coloring matter, whereby it was made to resemble butter, the product of the dairy, and at that time and place the defendants sold and delivered to a person named, one pound of such product as and for butter, the product of the dairy. There was a conflict of evidence produced by that adduced on the part of defendants. The plaintiffs had a verdict for the amount of the penalty, upon which judgment was entered January 4, 1887.

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The constitutionality of the statute in question is not now an open question. The principles applicable and controlling in that respect were involved in and have been determined by adjudications in support of the statute. (*People v. Arensberg*, 105 N. Y. 123; *People v. West*, 106 id. 293; *People v. Kibler*, Id. 321.) And the amendments to the sections 7 and 8, made by chapter 458 of the Laws of 1885, and by chapter 577 of the Laws of 1886, did not alter their provisions essential to the purpose of this section. And, therefore, such provisions will be deemed to have continued without interruption, notwithstanding the amendments were made by the taking of the sections into the amendatory acts and making them a part of the new statute. (*Ely v. Holton*, 15 N. Y. 595; *People ex rel. C. Nat. Bk. v. Bd. of Supervisors*, 67 id. 109.)

At the close of the evidence the defendants' counsel moved that the complaint be dismissed, because it was not made to appear by evidence that the product in question had been manufactured or was not in process of manufacture on April 30, 1885, which was the time when the act, which took effect immediately, was passed. No evidence was given upon that subject. And it is contended that this was a fact essential to recovery, and that the burden was with the plaintiffs to establish it by evidence. This provision of section 21 is not in the nature of a condition precedent to the right of recovery in the sense applicable to that term, but is a saving clause excepting from the operation of section 7 the product not wholly manufactured after the passage of the act. In such case, and in view of the fact that the party having the article in his possession, and dealing in it, may be supposed to have the means, which the plaintiffs have not, of tracing the product to the time of its manufacture, it is, and in this case it was, matter of defense, and for the defendants to establish by way of relief from the prohibitory provisions of the statute. (*Sheldon v. Clark*, 1 Johns. 513; *Potter v. Deyo*, 19 Wend. 361; *Fleming v. People*, 27 N. Y. 329; *Harris v. White*, 81 id. 532; *People v. Kibler*, 106 id. 321.) The motion was, therefore, properly denied, and there was no error in the charge as made

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upon the subject of the burden of proof, which was with the defendant.

The court was requested and declined to charge the jury that they must be satisfied, beyond a reasonable doubt, of the violation by the defendants, before they could find against them, and charged that they might so find upon a preponderance of evidence. And exceptions were taken. The proposition uniformly applied in criminal cases, which gives to the accused the benefit of any reasonable doubt, has, in some of the United States, and in others not, been deemed applicable to civil actions in which is involved for determination that which might be the subject of criminal prosecution.

We have examined the numerous reported cases of the several states and England and the text-books cited by counsel, and some other cases, upon this question, and think that in civil actions the rule that the preponderance of evidence is sufficient to warrant the finding of the fact in which is involved the charge of such character, has the support of the better reason. This question was well considered at the General Term, and it is deemed unnecessary to here specifically refer to the many cases on the subject. In this state there are but few reported cases in which the question was considered. In *Woodbeck v. Keller* (6 Cow. 119), which was an action of slander, upon the charge of perjury, the defendant sought to justify, and the court there said that the evidence must be the same as required to convict a defendant on an indictment for perjury; that there must be either evidence of two witnesses, or of one witness corroborated by material and independent circumstances, to establish the fact. And while there indicating and substantially declaring the doctrine contended for by defendants' counsel, the question did not necessarily arise in that case to the extent to require the determination whether or not the fact must be established beyond a reasonable doubt. And in *Clark v. Dibble* (16 Wend. 601) and *Hopkins v. Smith* (3 Barb. 599), the court was content with the citation of the *Woodbeck Case* on that proposition. The judicial declaration of that doctrine in England was fol-

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lowed by the courts, in some cases, in this country. This remark is more applicable to the earlier than to more recent cases. In the later cases where the question has arisen, the rule in that respect applicable to criminal cases had not been applied to civil actions in this state. In *Johnson v. Agricultural Insurance Company* (25 Hun, 251), it was held that the preponderance of evidence was sufficient to support the defense that the fire which caused the injury to the insured property, the subject of the action upon the policy, was set by the fraudulent act of the plaintiff. In citing that case in *Seybolt v. New York, Lake Erie & Western Railroad Company* (95 N. Y. 569), the court did not express any opinion upon the question now under consideration. But in *New York & Brooklyn Ferry Company v. Moore* (102 N. Y. 667, fully reported in 18 Abb. N. C. 106), the court said: "There is no rule of law which requires the plaintiff in a civil action, when a judgment against the defendant may establish his guilt of a crime, to prove his case with the same certainty which is required in criminal prosecutions. Nothing more is required in such cases than a just preponderance of evidence, always giving the defendant the benefit of the presumption of innocence." The rule so stated is the proper one applicable to the measure of evidence in civil actions, and such seems to be the weight of authority. (See cases collected in note to *Sprague v. Dodge*, 95 Am. Dec. 525.) And there is no apparent reason for making any distinction in that respect in behalf of a defendant in an action for a penalty, in which the People are the party plaintiff. It is no less a civil action because so brought. The purpose of the action is not the punishment of the defendant in the sense legitimately applicable to the term, but such action is brought to recover the penalty as a fixed sum by way of indemnity to the public for the injury suffered by reason of the violation of the statute. The effect of the recovery is merely to charge the defendant with pecuniary liability, while a criminal prosecution is had for the purpose of punishment of the accused.

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And the consequence of conviction may be more serious to him for the reason, if for no other, that it is deemed an imputation affecting his moral standing in a degree dependent, more or less, upon the nature of the crime. There is, therefore, some apparent reason for the application to criminal cases of the rule which continues the burden of proof on the prosecution throughout the trial, and requires that the evidence be such as to overcome all reasonable doubt of the guilt to justify conviction.

Only one other question was presented on the part of the defendants, and that arose upon motion made at the opening of the trial for direction that the plaintiff separate the allegations charging possession of the prohibited article, and the sale of it, so as to present them as separate and distinct causes of action; and that the plaintiff be required to elect upon which one of such causes he would rely in the action; also to direct a separation of the cause of action based upon the provisions of section 7 from that within those of section 8 of the statute. Whatever reasons may have been urged for or against the direction asked for, the most that can well be claimed on the part of the defendants is that such motions then made were addressed to the discretion of the trial court. (*Roberts v. Leslie*, 14 J. & S. 76.) That is not reviewable here.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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THE PEOPLE ex rel. PETER H. SHORT, Appellant, v. THE BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEW YORK, Respondent.

On *certiorari* to review the action of the Board of Fire Commissioners of the city of New York in transferring the relator from duty as chief of battalion in the fire department to that of foreman, it appeared from the return of the board that in July, 1886, one McC. held the position of second assistant chief of the department; that the board of fire commissioners adopted a resolution discharging him for incompetency and incapacity; and thereafter, on August 4, 1886, in good faith, believing said position to be vacant, by resolution promoted one R. to it from that of chief of battalion, and promoted the relator to the latter position from that of foreman. This resolution did not state that the promotion was made to fill a vacancy. Subsequently, on *certiorari*, the proceedings of the board in the removal of McC. were adjudged void and he was reinstated, and the persons so promoted were transferred back to their former positions. *Held*, that the return of the board must be taken as true; that its resolution promoting the relator must be construed in connection with the facts appearing, and when so construed, it appeared that no new office was created or intended thereby, but that the relator's promotion was to fill a supposed vacancy which did not, in fact exist; that the proceedings of the board were not in conflict with the provisions of section 440 of the New York Consolidation act (§ 440, Chap. 410, Laws of 1882), and were regular and proper.

Reported below, 47 N. Y. 528.

(Argued March 15, 1889; decided March 26, 1889.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 2, 1888, which affirmed an order of the Board of Fire Commissioners of the city of New York transferring the relator from duty as chief of battalion to duty as foreman in said fire department.

The facts are sufficiently stated in the opinion.

Edward E. McCall for appellant. Short having been established in the rank of chief of battalion, the commissioners could not remove him without first, preferring written charges, and, secondly, granting the accused a trial on same by virtue of the laws governing the discipline of the fire department. (*People v. Bd. of Fire Com.*, 72 N. Y. 445; *People v. Grant*,

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12 Daly, 294; *People v. Dept. Fire and Buildings*, 8 N. Y. State Rep. 634; *People v. Thompson*, 94 N. Y. 463; *People v. Fire Comrs.*, 23 Hun, 320; *People v. Campbell*, 18 J. & S. 90; *People ex rel. Blake v. Bd. of Police*, 27 Week. Dig. 213.) If the action of the commissioners is adjudged to have been legal and clearly within their power, and such proceeding is declared to have been a mere "transfer" and not a "removal," then the relator should lose neither the insignia of nor the salary or emoluments attached to the office of chief of battalion. (Laws 1887, chap. 218, 256; *People ex rel. v. Bd. of Police*, 75 N. Y. 38, 41, 42; *People ex rel. v. French*, 91 id. 265, 270.) If Short was promoted to fill a vacancy, and that vacancy the one created by the promotion of Chief Reilly to the rank of second assistant engineer, such an appointment was a valid and binding one, and was not in any manner affected by the subsequent decision in the case of *People ex rel. McCabe v. Fire Commissioners*. Chief Reilly, when he accepted the promotion tendered him by the board of fire commissioners voluntarily relinquished and impliedly resigned his office as chief of battalion. (*People v. Green*, 58 N. Y. 364; *Milward v. Thacher*, 2 T. R. 82; *People v. Nostrand*, 46 N. Y. 381; *People v. Carrique*, 2 Hill, 93.) The fact that the relator has continued to perform his regular duties as foreman and has accepted the salary of that position under protest is not a waiver of his rights. (*People ex rel. Satterlee v. Bd. of Fire Comrs.*, 75 N. Y. 38; *Keyn v. State*, 93 id. 291.)

William L. Findley for respondent. The writ of *certiorari* is granted only to review the determination of a body or officer, and a merely ministerial act cannot be inquired into in such proceeding. (Code of Civil Pro. § 2120; *People v. Walter*, 68 N. Y. 403; *People v. Bd. of Health*, 12 Abb. Pr. 88.)

HAIGHT, J. The relator brought *certiorari* to review the action of the respondent in transferring him from duty as chief

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of battalion in the fire department to that of foreman. It appears from the return of the respondent that in July, 1886, one John McCabe held the position of second assistant chief of the department; that the board of fire commissioners adopted a resolution on removing and discharging him from the position, on account of incapacity and incompetency; and thereafter, and on the 4th of August, 1886, the board, in good faith believing that the position of second assistant chief of department was then vacant, passed a resolution promoting Francis J. Reilly from the position of chief of battalion to that of second assistant chief of department, and thereupon, and at the same time, in good faith supposing the position of chief of battalion had been made vacant by the promotion of Reilly, passed another resolution promoting the relator from foreman to that of chief of battalion. Subsequently, McCabe procured a writ of *certiorari* in the Supreme Court to review the proceedings of the board in relation to his removal from office, and in that proceeding it was adjudged that the proceedings of the respondent were irregular and void, and that McCabe be reinstated in his office. Thereupon he was so reinstated, and Reilly, who had been promoted to his place, was transferred back to his former position, and the relator, who had been promoted to Reilly's place, was transferred back to his former rank.

It is contended, on the part of the appellant, that the board of fire commissioners had no power to thus reduce the rank of the relator; that his appointment to chief of battalion was, in effect, the creation of a new office, and that it was not to file a vacancy. It is true that the resolution of the board of fire commissioners appointing him chief of battalion is silent upon the question as to whether it was to fill a vacancy; but the return of the board is explicit upon the point, and states that the resolution or promotion was made in good faith, upon the supposition that there was a vacancy caused by the promotion of Reilly, and that Reilly's promotion was also made upon the supposition that there was a vacancy caused by the removal of McCabe. The return of the board must be taken as true.

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It follows that the attempted promotion by the resolution referred to was to fill a supposed vacancy which did not, in fact, exist.

The argument to the effect that the resolution created a new office for the relator is not founded upon any fact. An inference to that effect is attempted to be drawn from the resolution appointing him chief of battalion, but this resolution must be construed in connection with the facts appearing upon the return, and, when so construed, it distinctly appears that no new office was created or intended.

The court below was of the opinion that the relator had no just cause of complaint, and that the proceedings of the board were regular and proper and not in conflict with the provisions of section 440 of the New York Consolidation Act of 1892. This opinion is in accord with our view.

The order should be affirmed, with costs.

All concur.

Order affirmed.

HENRY CLEWS et al., Respondents, v. THE BANK OF NEW YORK NATIONAL BANKING ASSOCIATION, Appellant.

A draft drawn upon defendant was indorsed by the payee and mailed to the indorser; it never reached him, but fell into the hands of some person who presented and procured it to be certified by defendant; a memorandum showing the number and amount of the draft and that it was certified was entered upon a register kept by defendant of bills drawn upon it by the drawer of this one. The drawer notified defendant by letter of the miscarriage of the draft and not to pay it. Thereupon there was added to the memorandum the words, "stop pay't; see letter." Subsequently the draft, which had been altered by raising the amount and changing the date and name of payee, was offered to plaintiffs in payment for certain bonds. In an action to recover the amount of the draft as raised, aside from proof of these facts, plaintiffs' evidence was to the effect that they sent the draft to defendant's banking-house by a messenger, who presented it at the window of the paying-teller stating that plaintiffs wished to know whether the certification was good. The person in

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attendance, without referring to the register, answered "yes." Upon being advised of this plaintiffs received the draft in payment for the bonds. In an action to recover the amount of the draft as raised, *held*, that the evidence was sufficient to justify a finding of negligence on the part of defendant in failing to disclose the facts to plaintiffs' messenger and to authorize a recovery.

Also, *held*, that a refusal of the court to charge that the teller was not the agent of the bank for the purpose of giving information, other than as to genuineness of signature of drawer and acceptor, was not error.

Security Bank v. Nat. Bank of Republic (87 N. Y. 458) distinguished.

One of the plaintiffs, as a witness, was asked on cross-examination: "What do you understand to be the contract of certification of a check or draft?"

This was objected to and excluded. *Held*, no error.

Reported on former appeals, 89 N. Y. 418; 105 id. 398.

(Argued March 18, 1889; decided March 26, 1889.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made April 2, 1888, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

This action was brought to recover the amount of a draft. The material facts are stated in the opinion.

Wheeler H. Peckham for appellant. The question on the trial having been treated as a question of law by the parties and by the court, and the defendant not having claimed that the question was one of fact, and not having raised it, it could not have been raised by any request defendant made or by any exception to the charge that defendant took. (*Dodge v. Havemeyer*, 4 N. Y. State Rep. 562; *Waters v. Marrin*, 13 Daly, 57; *O'Neil v. James*, 43 N. Y. 85, 93; *First Nat. Bk. v. Dana*, 79 id. 109; *Stone v. Flower*, 47 id. 568, 569;

Muller v. McKesson, 73 id. 195; *City v. Copeland*, 106 id. 501.) A bank by certifying a check in the usual form simply certifies to the genuineness of the signature of the drawer and that he has funds sufficient to meet it, and engages that those funds will not be withdrawn from the bank by him; it does not warrant the genuineness of the body of the check as to

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payee or amount. (*Marine Bk. v. City Bk.*, 59 N. Y. 67; *Price v. Neal*, 3 Burr. 1354; 67 N. Y. 463.) When one states a thing to another with a view to influence another to alter his position, or knowing that as a reasonable man he will alter his position, then the person to whom the statement is made is entitled to hold the other bound, and the matter is regulated by the state of facts imparted by the statement. (*Anderson v. Reid*, 106 N. Y. 367, 368; *Knight v. Wiffen*, L. R., 5 Q. B. 660; 50 N. Y. 575, 581.) The payees of a check are presumed to have dealt directly with and to have received the check from the maker, and are presumed to know whether they are rightly named as payees. (*White v. Continental Bk.*, 64 N. Y. 316.) The plaintiffs, as holders of the bill, and claiming to be entitled to receive the amount thereof from the drawees, were held to a knowledge of their own title. (*Susquehanna Bk. v. Loomis*, 85 N. Y. 211; *Turnbull v. Routey*, 40 id. 456.) The case presented no question for the jury. (*Continental Bk. v. Bk. of Comm.*, 50 N. Y. 575; *Anderson v. Read*, 106 id. 343, 352; *Macullon v. McKinley*, 99 id. 357; *Kelly v. Burroughs*, 102 id. 93; *Ruiz v. Renaud*, 100 id. 256; *Dwight v. Ins. Co.*, 103 id. 341; *Brady v. Cassidy*, 104 id. 155.) The testimony of Sherman, the teller, not having been contradicted by any evidence in the case, nor being inconsistent with any fact, it required belief. (*Kelly v. Burroughs*, 102 N. Y. 93; *Searles v. M. R. R. Co.*, 101 id. 661.) Plaintiffs must allege and prove that the defendant made the false representation with intent to deceive, and knowing it to be false or assumed, or intended to convey the impression that he had actual knowledge of the truth of the representation, though conscious that he had no such knowledge. (*Macullon v. McKinley*, 99 N. Y. 358; *Wakeman v. Dalley*, 51 id. 34, 35; *Meyer v. Amidon*, 45 id. 169, 175; *Duffany v. Ferguson*, 66 id. 482-485; *Marsh v. Falker*, 40 id. 562; Bigelow on *Estoppel* [4th ed. 1886], 516, 588; *Freeman v. Cooke*, 2 Ex. 654; *Swan v. North British Co.*, 7 Hurl. & N. 603; 2 Hurl. & C. 175; *Bank v. Evans*, 5 H. L. Cas. 389.) The allegations in the complaint and the facts

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proved as to the correspondence between the Chicago Bank and the defendant do not take the place of allegation and proof that the defendant knew that his statement was false, or assumed knowledge of facts with the consciousness that he had no knowledge. (*Kelly v. Solari*, 9 M. & W. 54; 2 Smith L. Cas. 237 [Am. note] 403; *U. N. Bk. v. S. N. Bk.* 43 N. Y. 454; *Canal Bk. v. Bk. of Albany*, 1 Hill, 287; *Security Bk. v. National Bk.*, 67 N. Y. 458; *Second Nat. Bk. v. Walbridge*, 19 Ohio St. 419; *Spencer v. Carr*, 45 N. Y. 407.)

Albert A. Abbott for respondents. The law of the case having been fully settled by this court upon the two former appeals, the question will not be re-opened. (*Clark v. Keith*, 106 U. S. 464.) The plaintiffs parted with value to the full amount of the check, solely in reliance upon defendant's assurance that the check as presented was valid; and this assurance having been given through the culpable negligence of the defendant's teller it is estopped from denying its liability for the loss occasioned by its own act. (89 N. Y. 418; 105 id. 398; *Central Bk. v. N. Bk. of Commerce*, 50 id. 575; *Security Bk. v. Nat. Bk.*, 67 id. 462; *MERCHANTS' Bk. v. STATE Bk.*, 10 Wall. 604; *Marine Bk. v. Nat. City Bk.*, 59 N. Y. 67; *Espy v. Bk. of Cincinnati*, 18 Wall. 604; *Nat. Park Bk. v. Ninth Nat. Bk.*, 46 N. Y. 77; *Preston v. Mann*, 25 Conn. 117; *M. & T. Bk. v. Hazzard*, 30 N. Y. 230; *Blair v. Wait*, 69 id. 113; *Armour v. M. C. R. R. Co.*, 65 id. 116; *Brooks v. Martin*, 43 Ala. 360; *F. & D. N. Bk. v. B. & D. Bk.*, 16 N. Y. 125; *Meads v. Merchants' Bk.*, 25 id. 147; *Irving Bk. v. Wetherald*, 36 id. 335; *Pope v. Bk. of Albion*, 59 Barb. 226; *Moree v. Mass. Nat. Bk.*, 1 Holmes, 209; *Willets v. Phoenix Bk.*, 2 Duer, 121; *Grant v. Norway*, 10 C. B. 665; *Price v. Neal*, 3 Burr. 1355; *In re Land Credit Co.*, L. R., 4 Ch. App. 460; *Fleckner v. Bk. of U. S.*, 8 Wheat. 338; *E. R. Nat. Bk. v. Gove*, 57 N. Y. 597; *Bk. of Monroe v. Field*, 2 Hill, 445.)

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FOLLETT, Ch. J. On January 6, 1879, the Commercial National Bank of Chicago drew a sight bill on the defendant, of which the following is a copy:

“\$254.50. Duplicate unpaid.

“COMMERCIAL NATIONAL BANK OF CHICAGO.

“CHICAGO, ILL., Jan. 6, 1879.

Pay to the order of Wirt Dexter two hundred and fifty-four $\frac{5}{10}$ dollars.

“To the Bank of New York National Banking Association, New York. No. 73436.

“T. S. EAMES.

“A. Cashier.”

The payee indorsed and mailed the bill to Augusta H. D. Godman at the city of New York. The bill never reached the indorsee, but in some way fell into the hands of a knave. January fifteenth, this genuine bill was presented to William H. Meany, the paying teller of the drawee, who certified it by cutting through it near the right-hand end with a stamp, the words “Certified — Bank of New York, N. B. A.” and signing “Meany.” A memorandum of the bill was entered upon the register kept of bills drawn by the drawer upon the drawee, showing its number, amount and that it was certified. February tenth the drawer notified the drawee that the bill had not come to the hands of the indorsee, and not to pay it. This notification was received February twelfth, and thereupon the drawee added to the previous entry descriptive of the bill, made in its bill register, the words: “Stop pay’t, see letter of Feb. 10, 1879.”

March 3, 1879, a stranger to Henry Clews & Co., entered the banking house of that firm in the city of New York and purchased \$2,500 par value of United States four per cent bonds, and offered in payment an instrument in the form of a bill of exchange of which the following is a copy:

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"\$2,540. Duplicate unpaid.

"COMMERCIAL NATIONAL BANK OF CHICAGO.

"CHICAGO, ILL., Feb. 27, 1879.

"Pay to the order of Henry Clews & Co., twenty-five hundred and forty dollars.

"To the Bank of New York National Banking Association, New York. No. 73436.

"T. S. EAMES.

"A. Cashier."

Across this bill and near the right-hand end were cut the words : "Certified — Bank of New York, N. B. A." which was signed "Meany." Before receiving the bill in payment for the bonds, the plaintiffs sent it (March 3, 1879) to the defendant for the purpose of learning whether it was good. Precisely what was said by the plaintiffs' messenger to the defendant's teller and by him to the messenger was an issue of fact which was submitted to the jury. Upon the return of the plaintiffs' messenger the bonds were delivered to the purchaser with the plaintiffs' check for \$33.75, the difference between the purchase-price of the bonds and the bill. March fifth the bill for \$2,540 was presented to the defendant for payment, which was refused upon the ground that it was a forgery. It is conceded that the original bill (first above set forth) was changed from \$254.50 to \$2,540, Henry Clews & Co. substituted in the place of Wirt Dexter, as payees, and the date changed from January 6, 1879, to February 27, 1879.

This action was brought to recover the amount of the bill from the defendant upon two grounds: (1.) That the usual liability incurred by a certifying drawee was enlarged by the interview of March 3, 1879, between plaintiffs' messenger and defendant's paying teller; (2.) that the defendant was guilty of actionable negligence through the statement of its paying teller of March 3, 1879, to plaintiffs' messenger, and in not stating to him the facts within the knowledge of the defendant's officers and the paying teller.

Upon the trial of an issue of law raised by a demurrer inter-

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posed to the complaint, the demurrer was overruled and leave given to the defendant to answer. (8 Daly, 476.) Upon the first trial of the issue of fact the plaintiffs had a verdict, upon which a judgment was entered, which was affirmed by the General Term without an opinion, but was reversed by the Court of Appeals. (89 N. Y. 418.) Upon the second trial of the issue of fact the plaintiffs were nonsuited and the judgment entered thereon was affirmed by the General Term without an opinion, but was reversed by the Court of Appeals. (105 N. Y. 398.) Upon the third trial the plaintiffs had a verdict, upon which a judgment was entered, which was affirmed by the General Term, from which judgment of affirmance this appeal was taken. Upon the trial plaintiffs' messenger testified that, in obedience to his instructions, he handed the bill to some person standing at the paying teller's window in defendant's bank and said: "Henry Clews & Co. want to know whether the certification of this check is good;" that the person took the bill, rubbed his thumb over the corner where the amount had been written in, turned it over and looked at its back, said "yes" and handed it to the messenger, who returned to the plaintiffs with the information and bill. On the contrary, Mr. Sherman, defendant's certifying teller, testified that the bill was presented to him by the messenger who asked "if the certification was correct," and he, Sherman, replied "that it was." It is conceded that whoever answered the inquiry of the messenger did so without referring to the register of bills whereon was entered the number and amount of the original bill with the direction not to pay it, and that the numbers of the original bill and the forged bill were identical.

Four questions of fact were submitted to the jury: (1.) Whether plaintiffs' messenger presented the bill to defendant's paying teller as asserted by the plaintiffs, or to defendant's certifying teller as asserted by the defendant? The jury was instructed, that if this question was found against the plaintiffs they could not recover. (2.) "If, however, you are satisfied that this question was asked by McCormack (plaintiffs'

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messenger), at the paying teller's window, then you are to determine whether or not, as a matter of fact, the inquiry which he says he made of the person who occupied the position of defendant's paying teller, was understood by the latter as referring to the validity of the certification at the time of the inquiry, as distinguished from the genuineness of the marks of certification only; and, also, whether the answer made by the paying teller, or the person acting as paying teller, to Mr. McCormack referred to the check or draft, No. 73436 as certified, instead of the mere marks of certification." The court charged in respect to this issue: "If the question asked by plaintiffs' messenger was susceptible of two interpretations, one making the question refer to the certification only, and the other making it refer to the whole check, and the person of whom the question was asked, understood it as referring to the marks of certification only, the plaintiffs cannot recover." (3.) "If you believe from the evidence that the plaintiffs were guilty of negligence in not informing the defendant at the time of asking the question as to the circumstances under which the plaintiffs received the check, or, in not asking more definitely for the information they desired, and such negligence contributed to the result, then the plaintiffs cannot recover." (4.) "Whether or not the defendant was culpably negligent under the circumstances disclosed by the evidence in this case in answering the question which McCormack (plaintiffs' messenger) says he asked at the paying teller's window, without referring to the registration book and the book of stop payments which referred to the draft in question by its number, and would have disclosed the fraud. In that connection, I will also charge you, that if the defendant was guilty of no want of ordinary care in respect to the answer given to the plaintiffs' messenger, the plaintiffs cannot recover, for the inquiry was merely about the certification marks."

The remarks of the court, which accompanied the submission of these issues to the jury, were not unfavorable to the defendant, but all of the issues were found in favor of the plaintiffs.

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Upon the first trial the court instructed the jury, in effect, that if plaintiffs' messenger asked defendant's paying teller whether the certification was good, and the teller answered in the affirmative, the answer of itself, as matter of law, rendered the defendant liable. For this error, it is said (in 105 N. Y. 401), the first judgment was reversed.

In considering this case when it was before the Court of Appeals the second time, it was said: "It by no means follows, however, that that decision (89 N. Y. 418) established that the defendant was absolutely exempt from liability, and could not be held responsible even if the defendant, at the time the teller said the certification was good, had notice that it had ceased to be good by reason of the subsequent alteration of the draft, or had in its possession the means of ascertaining that fact, and the jury should find that it was guilty of culpable negligence, under the circumstances, in omitting to resort to those means of information, and thus misled the plaintiffs to their injury." (105 N. Y. 402.) * * * Again, it was said: "Without regard to the admissibility of evidence of usage, the plaintiffs had a right, under the circumstances offered to be proved, to go the jury on the question whether the inquiry made of the teller was understood by the parties as referring to the validity of the certification at the time it was exhibited to the teller, or only of the genuineness of the marks of certification, but also on the question whether it was culpably negligent under the circumstances to answer the question without referring to the certification book and the book of stop payments, which referred to the draft in question by number and would have disclosed the fraud." (105 N. Y. 403.) The fair import of this opinion, interpreted by the judgment rendered, is that the plaintiffs could recover if the jury should find, upon sufficient evidence, that the defendant was culpably negligent to the injury of the plaintiffs in not referring to its register of certified bills and the letter thereon referred to and reporting to the messenger that bill No. 73436 drawn by the Commercial Bank of Chicago was drawn for \$254.50, not for \$2,540; that it was certified by this bank for \$254.50 January

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15, 1879, more than forty days before the date of No. 73436 now presented by you, the drawer reports that it has been lost and its payment has been stopped. Defendant's cashier testified that all of these facts could have been learned from the register and the letter, all of which facts were at one time known to the paying teller, but were evidently not in mind at the time of the interview with plaintiffs' messenger.

Whether the defendant was negligent in this respect was submitted to the jury and found for the plaintiffs, and under the decision of the Court of Appeals it is sufficient to sustain the judgment, unless some error against the defendant was committed in receiving or rejecting evidence, or instructing or refusing to instruct the jury. The court was asked to charge, "that if the jury believe from the evidence that at the time the draft was presented at defendant's bank the person to whom it was presented did not know that it was the same draft payment of which had been stopped, or that it was an altered draft, but supposed it a genuine draft and answered the question in good faith, the plaintiffs cannot recover." This is not the test laid down by the Court of Appeals. The court expressly held that the plaintiffs need not go so far as to establish that the defendant or its paying teller was guilty of an intent to defraud the plaintiffs, but that a recovery might be had if the paying teller was negligent in failing to ascertain and disclose the facts to the plaintiffs' messenger. This is not an action for deceit, and the plaintiffs do not assert in their complaint or evidence that any one of the defendant's employes intentionally deceived the plaintiffs; and the instructions, asking that deceit must be established, were properly refused.

The appellant urges, in its tenth point, "that the court erred in refusing to charge that the teller was not the agent of the bank for the purpose of giving information other than as to genuineness of signature of drawer and acceptor." We are not referred to the folio where this request is found in the record, nor have we found it. *The Security Bank v. National Bank* (67 N. Y. 458) is cited in support of the

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position that the refusal of this request, if made and refused, is error. In the case cited, the plaintiff did not seek to recover upon the ground that the defendant was guilty of actionable negligence, but upon the contract of certification, which the plaintiff sought to enlarge by proving that the certifying teller gave the contemporaneous assurance that the bill was "correct in every particular," and the authority is not germane to the question here discussed.

The question put to Mr. James B. Clews, upon cross-examination, "What do you understand to be the contract of certification of a check or draft?" did not call for a relevant fact, and was properly excluded. He was not one of the parties to the contract, and his understanding of the effect of such contracts was not admissible for or against the plaintiffs. (*Security Bank v. National Bank*, 67 N. Y. 458.) The question did not call for the witness' understanding of the effect of the certification in question or for his understanding of the information received from the messenger, but for his understanding of contracts of certification.

The remaining exceptions seem to call for no consideration. The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

NEW YORK, PROVIDENCE AND BOSTON RAILROAD COMPANY,
Respondent, v. WILLIAM P. DIXON, as Assignee etc.,
Appellant.

114	80
138	479
114	80
143	436

The facts stated in a case submitted under the Code of Civil Procedure (§ 1279) were substantially these: The firm of M.'s Sons were the financial agents of the plaintiff. H., one of said firm, was also plaintiff's treasurer. The firm kept the transfer book, paid all dividends to plaintiff's stockholders and frequently was in advance to it, but neither charged nor allowed interest, and on plaintiff's books the account was kept in the name of the firm; it kept no account in the name of H. as treasurer. Remittances made by plaintiff were at one time made to the order of H., but at his request they were thereafter made direct to the order of the

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firm. Plaintiff's annual printed reports stated its funds were in the hands of the firm; there was no statement showing funds in the hands of the treasurer. The firm failed and made an assignment for the benefit of creditors without preferences. The members of the firm also made assignments of their individual estates. At this time the firm books showed an indebtedness to plaintiff of \$94,000. The firm assets were not sufficient to pay its debts. The individual estate of H. would pay his individual indebtedness, including the balance due plaintiff, if that should be decided to be an individual, not a firm indebtedness. *Held*, that the statement failed to show a receipt by H., as treasurer, of the moneys in controversy, but the indebtedness appeared to be simply that of the firm; and that plaintiff was only entitled to share with other firm creditors in the surplus of the individual assets of H. after payment of his individual indebtedness.

There is no difference between the powers, duties and liabilities of agents of corporations and those of natural persons, unless expressly made by the act of incorporation or by-laws.

(Argued March 13, 1889; decided April 16, 1889.)

APEAL by defendant from a judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 3, 1888, directing judgment in favor of plaintiff, on a submission of a controversy without action on agreed facts.

The statement of facts agreed upon and submitted was as follows :

"The New York, Providence and Boston Railroad, whose road extends from New London and Stonington, Connecticut, to Providence, Rhode Island, was incorporated by the legislature of the state of Rhode Island in June, 1892.

"Mr. Matthew Morgan of New York, father of Henry and Edward Morgan, the above-named assignors, and founder of the firm of Matthew Morgan & Son, bankers of New York, was the first president of the company, and that firm were its financial agents. After Matthew Morgan's death his sons continued the banking business, changing the firm name to M. Morgan's Sons, and one of them, Henry Morgan, the senior partner of the firm, in September, 1867, became treasurer of the railroad company, and continued to serve in that capacity, being elected

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year by year until June, 1884, and the firm of M. Morgan's Sons continued to act as the financial agents of the railroad company. They kept its transfer books and paid all dividends to stockholders and frequently were in advance to the company. Henry Morgan, who was one of the largest individual stockholders of the railroad company, served as treasurer of the railroad company without salary, and the firm of M. Morgan's Son's neither charged nor allowed interest on the railroad company's account. The account itself on the firm's books was kept in the name of the New York, Providence & Boston Railroad Company, and on the books of the railroad company the account was kept in the name of M. Morgan's Sons. The railroad company did not keep an account in the name of Henry Morgan, treasurer. Remittances were at one time made to the order of the treasurer, but after December, 1880, at the request of Henry Morgan, made, because of expected absence, the remittances were sent (though, so far as the minutes show, no action was taken by the board of directors on the subject) direct to the order of the firm of M. Morgan's Sons. The annual printed reports distributed to the stockholders of the railroad company, stated the funds in the hands of M. Morgan's Sons ; " there was no statement showing funds in the hands of the treasurer. In June, 1884, the firm of M. Morgan's Sons failed and made an assignment without preference.

" The individual members of the firm, Henry and Edward Morgan, at the same time made assignments, without preferences, of their individual estates. All the assignments were made to William P. Dixon. The books of the firm of M. Morgan's Sons show that at the time of the failure there was due to the railroad company the sum of ninety-four thousand dollars. The debts of the firm of M. Morgan's Sons were large, and the creditors of the firm will receive but a portion of the amount due them. The admitted debts of the individual members of the firm were small, and will be paid in full.

" The individual estate of Henry Morgan is sufficient to pay

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the amount due the railroad company in full, if, in the opinion of this honorable court, it should be decided that his individual estate is liable."

William Allen Butler for appellant. The fact that Morgan received no salary as treasurer is immaterial, because his duty to account for and pay over the funds of the company was not affected by this fact. The duty existed independently of the question of compensation. (1 Morawetz on Corp. §§ 503, 552.) As treasurer it was his duty to keep the money of the railroad company distinct from his own money and pay over any balance on demand. (*Second Ave. R. R. Co. v. Coleman*, 24 Barb. 300.) As a trustee he was bound to keep the funds separate from his private funds, and if he did not do so, he became liable as a borrower. (*In re Stafford*, 11 Barb. 353; *Mumford v. Murray*, 6 Johns. Ch. 1; *Baskin v. Baskin*, 4 Lans. 90, 93; *Case v. Abeel*, 1 Paige, 393; *Kellett v. Rathbun*, 4 id. 102; *Prescott's Estate*, 1 Tuck. 430; *Wharton on Agency*, § 279; *Wilmerding v. McKesson*, 103 N. Y. 329.) The treasurer of a corporation is responsible to the stockholders for the safe-keeping of the funds, and the benefit of this responsibility by depositing the funds with others for safe-keeping. (*Pearson v. Tower*, 55 N. H. 215, 217.) By putting the money in his own firm he made it apparently his own, but did not thereby relieve himself from the duty of answering for it, to his principal, unless the railroad company did some act equivalent to a release of his personal liability. (*Mass. L. I. Co. v. Carpenter*, 2 Sweeney, 734.) If the railroad company still retains its personal claim against Mr. Morgan, the fact that it has also acquired a further claim against the firm does not deprive it of the right to enforce its claim as against the separate estate of Henry Morgan. On the old cases it would have a right to elect as against the two funds; on the more recent authorities it has the right to prove against both estates and collect the full amount of its claim. (*B. W. Co. v. Juilliard*, 13 Hun, 506, 513; 75 N. Y. 535.) The sole question is whether or not the transactions amount,

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in law, to a release or a discharge of Mr. Morgan from his liability as treasurer. If money received by Morgan, as treasurer, had been placed by him on deposit with a bank or banking firm, such money would have been impressed with a trust in favor of the railroad company, and could have been followed by the company and recovered, so long as it had not been transferred for value without notice. (*Van Allen v. Am. Nat. Bk.*, 52 N. Y. 1; *Nat. Bk. v. Ins. Co.*, 104 U. S. 54.) The right of the general creditors to have Morgan's individual property applied to the payment of their claims is subordinate to the settled rule that individual creditors must be first paid out of individual property. (*Hewitt v. Northrop*, 75 N. Y. 506.)

Wheeler H. Peckham for respondent. Even if the treasurer had possessed all the powers ascribed to him by plaintiff, and had of his own motion deposited these moneys to the credit of the plaintiff, he would not be liable. If the agent keeps the funds of his principal separate from his own and deposits them with reputable banks or bankers, he fulfills his whole duty and is no longer responsible. (1 Perry on Trusts, § 443; *Johnston v. Newton*, 11 Hare, 160; *Baskin v. Baskin*, 4 Lans. 90; Hill on Trustees [3d Am. ed.] 573, note 1; *In re Stafford*, 11 Barb. 354.)

PARKER, J. It appears from the books of M. Morgan's Sons, bankers, the financial agents of the New York, Providence and Boston Railroad Company, that, in June, 1884, when the firm failed and made a general assignment, without preference, for the benefit of creditors, it was indebted to plaintiff in the sum of \$94,000.

Henry Morgan, the defendant's assignor, was a member of the firm of M. Morgan's Sons. He also made a general assignment, without preference, of his individual property. The liability of the firm to the plaintiff for the amount on deposit is unquestioned. That the balance of the estate of Henry Morgan, after the payment of his individual liabilities, must

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be applied in payment of the firm obligations follows as a matter of law. The question now to be determined is whether or not Henry Morgan is also liable for such amount as treasurer of the plaintiff.

There is no difference in principle or precedent between the powers, duties and liabilities of the agents of corporations and those of natural persons, unless expressly made by the act of incorporation or by-laws. (Angell & Ames on Corp. [9th ed.] § 315; Pomeroy's Eq. Juris. vol. 2. § 1062 and notes.)

The stipulation states that the plaintiff is a foreign corporation, to wit, a corporation of the state of Rhode Island, but is silent as to what are the powers, functions and duties of the treasurer of such foreign corporation, as determined by its charter and by-laws. Neither does it appear that Henry Morgan has been guilty of a breach of any duty imposed, by the contract between the corporation and him as its treasurer, or by the charter and by-laws. The stipulation is silent upon those points.

In the absence of such proof, as between Henry Morgan as such treasurer and the plaintiff, he must be held to the same measure of liability, and none other, as that imposed upon all classes of persons who are clothed with fiduciary relations towards property in which others are beneficially interested.

By such standard he cannot, in any event, be held liable to respond to the plaintiff for moneys not received by him, and, we think, it cannot be held, from the evidence before us, that the treasurer received from the plaintiff the moneys in controversy.

Many years prior to the election of Henry Morgan as treasurer, the firm of Matthew Morgan & Son were the financial agents of the plaintiff, and after the death of Matthew Morgan the firm of M. Morgan's Sons continued to act in such capacity down to the time of the making of the general assignment.

As financial agents of the plaintiff the firm kept the transfer books of the railroad company, paid all dividends to stockholders, frequently advanced money to the company and

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neither charged nor allowed interest on the railroad company's account.

On the part of the railroad company, it is not only admitted, in so many words, that M. Morgan's Sons were its financial agents, but, in addition, it appears, from the manner in which the plaintiff conducted its business, that while Henry Morgan was its treasurer, it, nevertheless, recognized and permitted the exercise of certain functions by M. Morgan's Sons, whom they termed financial agents, which were not attempted to be exercised by its treasurer.

The keeping of the transfer books of the company, the payments of dividends, the advancement of moneys, the waiver of interest on advancements, the refusal to allow interest on deposits, by the financial agents, were ratified and acquiesced in by the corporation.

Beyond this the plaintiff distinctly recognized the relation existing between it and M. Morgan's Sons by keeping the accounts on its own books in the name of such firm, and by publishing in its annual reports, distributed to stockholders, that its funds were in the hands of M. Morgan's Sons.

It appears clearly, therefore, that the railroad company recognized the relation existing between it and its financial agents to be separate and apart from the obligations and duties of its treasurer. That in its transactions with M. Morgan's Sons as financial agents, it did not transact nor did it understand it was transacting business with Henry Morgan as treasurer.

Now it appears that, prior to December, 1880, and prior also to the deposit of the moneys in question, remittances were, for a time, made to the order of the treasurer, who deposited them with M. Morgan's Sons, but about that time, at the request of the treasurer, because of expected absence, the remittances were thereafter sent to the order of the firm of M. Morgan's Sons. The financial agents, therefore, and not the treasurer, received the moneys with which the plaintiff seeks to charge the treasurer in this action, and under no rule of liability applicable to agents or trustees, can the

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plaintiff recover of Henry Morgan that which he has not received, and which it has, in fact, paid to other parties.

If, however, it be conceded, as contended for by the respondent, that the sending of remittances to the order of M. Morgan's Sons was, in effect, sending them to the treasurer (because done at his request); and that the deposit with the firm must be deemed a deposit by him, liability of Henry Morgan as treasurer to respond for the fund is not established. The moneys are not now in his possession ; he has not wasted or mixed them with his own, but has properly discharged his trust by depositing the funds with the banking firm recognized by the plaintiff as its financial agent and place of deposit for a long period of years. Had the designation of M. Morgan's Sons as the place of deposit been made by the treasurer, in the first instance, instead of the plaintiff, and conceding, further, that he can be held to have received and deposited the moneys with the banking firm, still he cannot be held liable as treasurer because his act in so doing was fully ratified by the plaintiff.

His request that the remittances be sent to M. Morgan's Sons, because of his intended absence, was a distinct notice of the place of deposit. It called the attention of plaintiff sharply to the fact, and plaintiff acquiesced in the depository by the sending of remittances to the order of the firm, and further evidenced the acquiescence by keeping the account on the books of the corporation, in the name of the banking firm, and by reporting to its stockholders that its funds were in the hands of M. Morgan's Sons.

The conduct of the corporation constituted a complete ratification of the act of the treasurer (if his act it was) in selecting the place of deposit, and absolved him from liability in that regard.

It follows, as the necessary result of our views, that the judgment appealed from should be reversed, with costs.

All concur.

Judgment reversed.

Statement of case.

WILLIAM WATSON, Administrator, etc., Appellant, v. THE CITY OF KINGSTON, Respondent.

In pursuance of ordinances duly passed by defendant's common council, establishing the grade of one of its streets, which was cut along the side of a hill, and directing the manner of construction, a dry wall was laid to carry the street up to grade in front of the premises of E., plaintiff's intestate, which were on the lower side of the street. By such ordinances the owner of abutting property was given the privilege of constructing a wall of masonry, but E. refused to avail herself of this permission or to pay for cement in which to lay the wall. Subsequently water came down the gutter on the lower side of the street and passed through the gutter and wall onto said premises, causing damage. In an action to recover therefor, it did not appear that said premises were subjected to any further burden in reference to surface-water than they were required to bear when in their natural state, *Held*, that defendant was not liable; that in establishing the grade and adopting plans for the improvement of the street the common council acted judicially, and in the exercise of the discretionary power vested in it, and for such acts an action would not lie; also, that the action could not be sustained upon the theory of negligent or unskillful construction of the wall.

The ordinances required the sidewalks, curbs and gutters to be constructed by the abutting owners or occupants. E. constructed the gutter in front of her premises, using cobble-stones, instead of flat stone, as contemplated by the ordinance, and the water flowed through between the cobblestones and thence through the wall. *Held*, that, in the absence of proof establishing that defendant's officers or agents had interfered with the gutter after it was laid, E., not the defendant, was responsible for the improper construction of the gutter.

Reported below, 48 Hun, 367.

(Argued March 25, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 13, 1887, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial.

This action was brought originally by Esther Watson, the present plaintiff's intestate, to recover damages to her premises in the city of Kingston, alleged to have been caused by defendant's negligence and unlawful acts.

The material facts are stated in the opinion.

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S. L. Stebbins for appellant. The defendant was not justified by the fact that the dry retaining wall was provided for in its plan or specifications. The destruction of half the value of the plaintiff's premises by turning the water from the street upon them was a taking of private property for public use without compensation. (*Seifert v. City of Brooklyn*, 101 N. Y. 136.)

John J. Linson for respondent. The differences claimed to exist between the work as done and that required by the ordinance were too minute to furnish foundation for this action. (*In re M. L. Ins. Co.*, 89 N. Y. 530.) Where power is conferred upon a municipal corporation to make local improvements, its exercise is *quasi* judicial or discretionary, and for a failure to act, or an erroneous estimate of the public needs, a civil action cannot be maintained against it. (*Urquhart v. City of Ogdensburg*, 91 N. Y. 67; *Wilson v. Mayor, etc.*, 1 Denio, 595; *Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Mills v. Brooklyn*, 32 id. 489; *Lynch v. Mayor, etc.*, 76 id. 60; *Rutherford v. Village of Holley*, 105 id. 632; *Heiser v. Mayor, etc.*, 104 id. 68.) The plaintiff's rights are such as had accrued prior to the commencement of the action. (*Blunt v. McCormick*, 3 Denio, 283; *Duryea v. New York*, 26 Hun, 120; *McKeon v. Lee*, 4 Robt. 470; *Uline v. R. R. Co.*, 23 Week. Dig. 204.) Where, by the exercise of slight care, by taking a little precaution, damage can be avoided, it is the duty of one so to do, and if he fails in this respect, he cannot hold another liable for acts which were within the scope of the latter's legal power. (*Hoehl v. Muscatine*, 57 Iowa, 444; *Tallman v. Muscatine*, Id. 457.)

HAIGHT, J. The complaint, in substance, alleges that the plaintiff is the owner of a house and lot in the city of Kingston on the north-east corner of Ravine and German streets; that the defendant, in grading Ravine street, proceeded irregularly and without authority of law; that in so doing the city built a wall and embankment in front of the plaintiff's premises

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rendering access thereto difficult and inconvenient ; that the wall and embankment was constructed so negligently and unskillfully as to cause and permit the water, which would otherwise have passed down Ravine street without injury to the house and premises of the plaintiff, to flow into and upon the same to their injury ; that in such grading, the defendant wrongfully and illegally gathered and collected large quantities of water which otherwise would not have reached the plaintiff's premises, and had been accustomed to flow elsewhere, and caused the water to flow down Ravine street until near the premises of the plaintiff, and then by negligently and unskillfully omitting to provide safe, sufficient and proper means for carrying the water, and by negligent and unskillful grading of the street caused the accumulated water to flow across the street and into and upon the house and premises of the plaintiff.

Ravine street is cut along the side of a hill, ascending the same at a steep grade ; Spring and Spruce streets cross the same as the street ascends the hill. The plaintiff's house is located on the lower side of Ravine street. In 1879, the common council of the defendant passed an ordinance establishing the grade of that portion of Ravine street lying between German and Pierpont streets, and, in May, 1883, passed another ordinance, directing that that portion of Ravine street be graded according to the established grade theretofore fixed by the ordinance of 1879, and in accordance with the plans and specifications theretofore prepared by the city engineer and approved by the common council. And, at the same time, passed another ordinance directing that sidewalks be constructed upon the street ; that the same be curbed and guttered according to the specifications contained in the ordinance, and that the same be done by the owners or occupants of lands abutting thereon, and, if not so done by them within a specified time, that it should be done by the common council at the expense of the owners or occupants respectively. The specifications for the grading of Ravine street, prepared by the engineer and approved by the common council, pro-

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vided that where lots or buildings are based upon lower levels than the established grade, that the grade and sidewalk should be supported by a dry wall of stone, so as to prevent the earth-work from extending beyond the street line and to avoid encroachment upon the basements of buildings. The specifications further provided that the property owners should have the privilege of constructing a wall of masonry in lieu of the dry wall provided for in the specifications.

The evidence tends to show that the plaintiff's premises were at a lower grade than that established for the street, and that in front of the plaintiff's house a dry wall was constructed; that, subsequent to the grading, water came down the street, penetrated through the gutter and wall so constructed onto the plaintiff's premises, causing her considerable damage.

Our attention has been called to no irregularity in the proceedings or ordinances of the common council, tending to show that the grading of Ravine street was without authority of law, and we shall, consequently, assume that such proceedings and ordinances were regular and valid. The plaintiff's house had been built upwards of thirty years, before a grade had been established for Ravine street, and, consequently, no cause of action will lie because of the establishing of the grade of the street higher than the plaintiff's lot.

The duty devolved upon the municipality of establishing a grade for the street, and of so working and improving it as to make it safe and convenient for the passage of the public. In establishing the grade and adopting plans for the improvement of the street, the common council acted judicially in the exercise of its judgment and of the discretionary power vested in it, as to what would best serve the public interest; and the rule is that a civil action will not lie for acts that are judicial in their character, and discretionary. (*Urquhart v. City of Ogdensburg*, 91 N. Y. 67.)

The wall that was built in front of the plaintiff's premises was a part of the plan approved by the common council for the improvement of the street. Its object was to prevent the earth-work from extending beyond the line of the street

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and encroaching upon the plaintiff's premises. No other or better plan has been suggested, nor is it claimed that there was any error in the judgment or discretion of the common council in approving it. In adopting it they acted judicially, and it follows that no recovery can be had on account of the inconvenience occasioned by it.

It is claimed that the defendant wrongfully and illegally gathered and collected a large quantity of water from distant territory and caused the same to flow down upon the plaintiff's premises. It must be borne in mind that the plaintiff's premises are located upon the side of a steep hill or ravine, and that the flow of water is downward, and that in a state of nature the plaintiff's lands must take the surface-water that flows from the lands above. The evidence shows that water collected upon the surface of the streets does flow down Spring and Spruce streets to their intersection with Ravine street. It further appears that at the intersection of Spring and Ravine streets there are two sewers, of sufficient capacity to receive and convey away all of the water collecting at that place except, perhaps, on one or two occasions of great freshets, when brush and other debris had washed down and temporarily clogged or closed the sewers. The only water collected, which flows down by the plaintiff's premises, is that collected upon the surface of the road-bed between the point of the intersection of Spring street and the plaintiff's premises, except on the occasions alluded to. There is nothing in this collection of water that differs from that which is necessary in the construction of all streets and road-beds; and it does not appear that the plaintiff's premises are subjected to a further burden in reference thereto than they were required to bear when they were in a natural state.

Some evidence was given with the view of showing that the street was not graded in accordance with the plans and specifications provided for in the ordinance. The grade, as established by the ordinance, was for the center line of the street. The survey made by the plaintiff's engineer was at the curb of the street instead of at the center. It is, consequently, not

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surprising that some variations should be found to exist. But however that may be, the witness, in closing his testimony, disposes of this branch of the case by testifying that the street was graded substantially according to the requirements of the ordinance, except slight variations at some points.

We now approach the consideration of a more serious question, and that is as to whether the wall and gutter were so negligently and unskillfully constructed as to permit the water to flow through them onto the plaintiff's premises. The judicial discretion which shields the municipality from liability in the establishing of the grade, or adopting the plans for improving the street does not extend to negligent or unskillful workmanship. Watson, the plaintiff's husband, testified that "the place where the water came in was through my gutter at the upper corner of the lot." He further testified that it flowed through the dry stone wall onto their premises, doing the damage complained of. It thus appeared that the water that did the damage complained of was the water flowing through the gutter upon the eastern side of the street, and that when it got opposite of the plaintiff's premises it flowed or percolated through the gutter and wall onto the same.

The first question to be considered is whether the wall was negligently constructed. It is conceded that it was laid up dry without cement, except for a small portion thereof; but a dry wall was all that was called for by the specifications approved by the council. Some evidence tends to show that some portion of it was constructed of slate stone, which would slacken and crumble to pieces, but no evidence shows that any of the stone of the wall had so crumbled to pieces. Other evidence was given on behalf of the defense tending to show that the wall was constructed of good material, in a good, workmanlike manner. In case of conflict of testimony the facts, if material, should be determined by the jury. But, under the view which we take of the case, the conflict in the testimony at this point becomes unimportant. A dry wall cannot well be constructed so as to be water-tight, and it does not appear to have been within the contemplation of the

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parties that it should be so constructed. The specifications prepared by the engineer and approved of by the council, gave to the owner of the abutting property the privilege to construct the wall of masonry. The plaintiff had this privilege, but she refused and neglected to avail herself of it. The contractor who built the wall for the city was willing to lay it up in cement, provided the plaintiff would furnish the cement. He had even procured the cement and had laid some of the wall in it when the plaintiff refused to pay therefor, and the contractor consequently laid up the rest of the wall dry in accordance with the specifications. In view of these facts, the claim based upon the theory of negligent and unskilled construction of the wall cannot be sustained.

In the second place the gutter was improperly constructed. It was made of cobble-stone, and the water, running along the gutter of the street, would flow down between the cobble-stone composing the gutter and thence through the wall. It does not, however, appear that the city is responsible for the construction of the gutter. The ordinance requiring the construction of sidewalks, curb and gutters for the city, required the construction to be made by the owners or occupants of lands abutting upon the street. The plaintiff, through her husband, constructed the gutter in question, using cobble-stone instead of flat stone fourteen inches wide as contemplated by the ordinance. He complains that there was not earth enough to properly lay and embed the cobble-stone in the gutter. If so, then he should have procured more earth, for, under the ordinance, the plaintiff was to construct the gutter at her own expense, and the city did not undertake to furnish the material necessary therefor. Watson tells us, however, that after he had laid the gutter he went to Philadelphia, and on his return he found that it had been taken up, raised higher and had been relaid. It does not clearly appear by whom the gutter was taken up and relaid, and the question as to whether it was taken up at all is in dispute, for Pervius, who was at the time alderman and one of the committee on streets, and was in charge of the work, testified that the gutter put in by Watson was not interfered

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with at all ; that the only change that was made was in raising the curb higher, and that this was done before the gutter was put in. If the gutter was, in fact, put in by the city, then a question would be presented for the consideration of the jury, for it is not claimed to have been properly constructed by either party. Watson, however, does not pretend to know who relaid the gutter ; he says it was done in his absence. The duty of constructing the gutter, under the ordinance, devolved upon the plaintiff ; the plaintiff furnished the material and constructed the same ; the plaintiff has failed to show that it has been since tampered with by the defendant or any of its officers or agents. If the gutter was relaid, whoever did it appears to have used the same cobble-stone, and it does not appear but that the work was as well done as it was in the first instance by the plaintiff.

We are, consequently, of the opinion that the judgment should be affirmed, with costs.

All concur, except FOLLETT, Ch. J., not voting, and PARKER, J., not sitting.

Judgment affirmed.

JAMES E. OSTRANDER, Respondent, v. **JOHN WEBER**, Appellant ; **JOSEPH H. RISLEY**, as Receiver and Sheriff, etc., et al., Respondents.

Plaintiff's complaint alleged, in substance, that he was the holder of a chattel mortgage covering a portion of the furniture and fixtures of a hotel; that defendant H. was the holder of two junior mortgages covering portions of said property, and some not covered by plaintiff's mortgage; that defendant W. held another mortgage covering all of said property; that the sheriff, by virtue of a judgment and execution in favor of defendant L. against the person holding the property and carrying on the hotel, had levied upon said property and was proceeding to sell the same; that W., L. and the sheriff claimed their liens were prior to that of plaintiff's mortgage because of his omission to renew it by reffiling; that the property, if sold in bulk, would produce enough to pay all the liens, but would bring much less if sold separately with the conflicting claims thereon. The complaint asked for the appointment of a receiver

114	95
118	613
114	95
130	648
131	506

114	95
136	474
114	95
137	470
138	460

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with authority to sell the property in bulk and distribute the proceeds under the direction of the court and in accordance with the rights and priorities of the parties. *Held*, that the complaint set forth various subjects of equitable jurisdiction, *i. e.*, the foreclosure of chattel mortgages, the determination between creditors of the extent and priority of conflicting liens, the advantages to creditors of a sale in bulk instead of in separate parcels, each of which was sufficient to maintain an action in equity, and their combination in one complaint would not defeat the action; also, that, in the absence of a demurrer or answer presenting the question that plaintiff had a remedy at law, that objection could not be raised.

The defendant, in an equity action, in order to insist that an adequate remedy exists at law, must set it up in his answer.

Orders were granted in the action appointing a receiver and directing him to sell the property and confirming his report of sale. *Held*, that these orders being proper to the action and resting in the discretion of the court, were not reviewable here.

Plaintiff's mortgage was given to secure him from liability as indorser upon notes made by the mortgagors. *Held*, the objection that the holder of the notes was not made a party, not having been raised by demurrer or answer, was not available here.

It seems that if it had been raised, it would not have been tenable; that plaintiff was, in respect to the notes, the trustee for the holder and represented said holder to all intents and purposes.

(Argued March 7, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 3, 1887, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

S. L. Stebbins for appellant. The defect of parties is fatal to the judgment, and the objection is one in which the court itself is bound to take. (*Sturtevant v. Brewer*, 17 How. Pr. 571; *Shaver v. Brainard*, 29 Barb. 25; *Oesterhout v. Super-visors*, 98 N. Y. 239, 242, 243, 244.) It was necessary for plaintiff to show that he needed the intervention of a court of equity for his protection. This he did not do either in his complaint or on the trial. (2 R. S. 365, 366, §§ 13, 17; *Hale*

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v. *Sweet*, 40 N. Y. 97; *Meech v. Patchin*, 14 id. 71; *Jones v. Howell*, 3 Robt. 438; *Gregory v. Thomas*, 20 Wend. 17; *Horton v. Davis*, 26 N. Y. 495.) The relative rights of the parties being clear beyond dispute, and no suit being threatened, there was no reason to apprehend and no need of a resort to equity to prevent a multiplicity of suits. (1 Wait's Pr. 128.) The complaint should have been dismissed for not stating facts sufficient to constitute a cause of action in equity, and the objection was not waived. (Code Civ. Pro. § 499.) As to the great bulk of the property in litigation the plaintiff not only failed to establish an apparent right to it, but it affirmatively appeared that he had no legal interest in it whatever, and he failed to show any reason or justification for his interference by this action with the rights and property of others. (*Trotty v. Logan*, 80 N. C. 69; *La Chaise v. Lord*, 1 Abb. Pr. 213; *Gallatin v. Oriental Bank*, 16 How. Pr. 253; *Patten v. Accessory Transit Co.*, 4 Abb Pr. 235; *Smith v. Wells*, 20 How. Pr. 158, 166; *Hallenbeck v. Donnell*, 94 N. Y. 342; *Starr v. Rathbone*, 1 Barb. 70; 2 Jones on Mortgages [1st ed.] § 1532; *Bruce v. D. & H. C. Co.*, 19 Barb. 371; *Shotwell v. Smith*, 3 Edw. Ch. 588; *Quincy v. Cheeseman*, 4 Sandf. Ch. 405; *Weeks v. Cornwell*, 9 N. Y. Civ. Pro. R. 28.)

J. Newton Fiero for plaintiff, respondent. The action could be maintained as an equitable action brought to avoid a multiplicity of suits and protect the fund, and by sale of the property bring into court a fund for distribution. (1 Story's Commentaries, 84; *Jesus College v. Bloom*, 3 A. T. K. 262; 1 Story, 439; 2 id. 149; *Supervisors v. Deyo*, 73 N. Y. 219, 225; *Thompson v. Van Vechten*, 5 Duer, 624; 27 N. Y. 568; *Anderson v. Hunn*, 5 Hun, 82; 25 id. 411.) Weber has not raised the question by answer or demurrer, and cannot for the first time raise it on the hearing. (*Ludlow v. Simond*, 2 Caine's Cas. 55; *Grandin v. Le Roy*, 2 Paige, 509; *Wiswall v. Hall*, 3 id. 313; *Le Roy v. Platt*, 4 id. 81; *Hanley*

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v. Cramer, 4 Cow. 717; *Truscott v. King*, 2 Seld. 165; *Anderson v. Hunn*, 5 Hun, 83; *G. S. Bk. v. Shaver*, 25 id. 411.) The order appointing a receiver was a proper order in the case. (Code Civ. Pro. § 317, sub. 1; *Thompson v. Van Vechten*, 5 Duer, 624; *Bayard v. Fellows*, 28 Barb. 451; *Van Husen v. Radcliff*, 17 N. Y. 580; *Jones v. Graham*, 77 id. 628; *Lewis v. Palmer*, 28 id. 278; *Marsden v. Cornell*, 62 id. 219; *Gildersleeve v. Landon*, 73 id. 610; *Mack v. Phelan*, 92 id. 25.) Independent of any statute a court of equity has inherent power to direct a disposition of a fund as it shall deem wisest and best for all concerned. (*Smith v. Danzig*, 3 Civ. Pro. Rep. 138; *Prentice v. Janssen*, 79 N. Y. 479.) The defendant Weber gets no benefit from the omission to refile the Sleight mortgage, because he took his mortgage for a precedent debt, and was not a *bona fide* purchaser under the statute. (Laws of 1883, chap. 279; 3 R. S. [6th ed.] 2249, § 3; *Van Husen v. Radcliff*, 17 N. Y. 580; *Thompson v. Van Vechten*, 27 id. 581; *Jones v. Graham*, 77 id. 628; 4 Paige, 215; *Lewis v. Palmer*, 28 N. Y. 278; *Marsden v. Cornell*, 62 id. 219; *Gildersleeve v. Landon*, 73 id. 618; *Mack v. Phelan*, 92 id. 25; *Meech v. Patchin*, 14 id. 71; *Farmers' Loan and Trust Co. v. Hendrickson*, 25 Barb. 488; *Heyman v. Jones*, 7 Hun, 238; *Sullivan v. Toale*, 26 id. 204; *Hill v. Beebe*, 3 Kern. 556; *Bennett v. Bates*, 94 N. Y. 363; *Halliday v. F. Bk. of Columbus*, 16 Ohio, 534; *Razee v. Lancaster Bk.*, 14 id. 318; 27 Alb. Law Jour. 300; *Van Thorn v. Peters*, 26 Ohio St. 471.)

John F. Cloonan for defendants, respondents. As the rights and interests of the various lienors can be determined in this action, and a wasting and sacrifice of the property and a multiplicity of suits will be prevented, the action is maintainable. (Code of Civ. Pro. §§ 713, 1737; *Charles v. Stevens*, 3 Denio, 36; *Thompson v. Van Vechten*, 5 id. 618; 27 N. Y. 568; *Anderson v. Hunn*, 5 Hun, 82; 1 Pom. Eq. Jur. §§ 181, 243; *McHenry v. Hazard*, 45 N. Y. 580; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id. 30, 44; 17 id. 592; 101 id. 639; *Turner v. Crichton*, 53 id. 641; *Platt v. Platt*,

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66 id. 360.) The objection that cross answers should have been served as between the defendants Loughran and Weber, pursuant to section 521 of the Code, has been waived and cannot be taken for the first time in this court. (*Albany City Savings Inst. v. Burdick*, 87 N. Y. 40-46; *Edwards v. Woodruff*, 90 id. 401.) The final order, interlocutory judgment and the intermediate orders should be affirmed, the Court of Appeals having held that this action could be maintained. (*Ostrander v. Weber*, 101 N. Y. 639.)

POTTER, J. This is an action in equity, brought by the holder of one chattel mortgage, covering a portion of the furniture and fixtures used in a hotel known as the Mansion House, in the city of Kingston, executed to one John D. Sleight, by the then owners of said property and proprietors of said hotel, Emma Brigham and Daniel O'Connell, to secure said Sleight on account of his liability as indorser upon certain notes made by said Brigham and O'Connell, and in respect to which notes the makers had made default in payment, and one of which said plaintiff, as a second indorser to Sleight, had paid before the action was brought. The Sleight mortgage had been assigned to the plaintiff and was held by him at the time of the commencement of this action. The defendant Humphrey also held two chattel mortgages upon distinct portions of the furniture, and the property covered by each of the Humphrey mortgages covered property distinct from the property covered by the Sleight mortgage. The Humphrey mortgages were subsequent in date to the Sleight mortgage, and were executed by said firm of Brigham & O'Connell.

After the execution of these three mortgages, said Brigham and O'Connell sold all of said furniture and fixtures in lump to one Oliver H. Brigham, who carried on the hotel business and used the property covered by said mortgages for that purpose. After such purchase by said Oliver Brigham, he executed a mortgage to the defendant Weber, upon all of said property, and possibly upon some property besides.

After the execution of the last-mentioned mortgage by said

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Oliver Brigham to Weber, and while said Brigham was carrying on the hotel business and using the property covered by said mortgages for that purpose, the defendant Loughran obtained a judgment for \$613.89 against said Oliver H. Brigham, and execution was issued to the defendant Risley, sheriff of Ulster county, who, by virtue of said execution, levied upon all the property covered by said chattel mortgages, or any of them, and was proceeding, in due course, to sell the same under said levy.

At this time said plaintiff and said Humphrey were threatening to take possession of the portions of the property covered by their respective mortgages. The defendant Weber was claiming that the lien of his mortgage was prior to the plaintiff's, by reason of an alleged failure to renew the same by re-filing, as provided by law, and the defendants, Loughran, the judgment creditor, and Risley, the sheriff, were claiming that the lien of the levy was also prior to the lien of plaintiff's mortgage for the same reason, and threatened to sell the property and distribute the proceeds of the sale accordingly. In this condition of affairs the action was commenced; the complaint setting forth the situation, the conflicting claims, and, in addition, that the property was adapted and suitable for the business of keeping a hotel, and that if sold together it would produce enough to pay the liens upon it, but that if sold separately, and with the conflicting claims and resulting law suits, it would not produce nearly so much as if sold in bulk and in connection with the hotel business and lease, and that said Oliver Brigham is desirous of disposing of the lease and good will, etc., asking for the appointment of a receiver authorized to sell the same in bulk and to distribute the proceeds under the direction of the court, and in accordance with the rights and priorities, as the same should be established by the court in this action. None of the defendants served an answer except the defendants Weber and Loughran. The former admits the giving of the mortgage to him, as stated in the complaint, and that he has no knowledge or information sufficient to form a belief as to the other material allegations

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in the complaint, and the latter admits the allegations contained in the complaint, alleges that the lien of the levy is prior to the liens of the plaintiff and the Weber mortgages, and that a receiver has been appointed, and that a speedy sale in bulk is most advantageous to all parties.

The situation may be summarized as follows: That three of the parties had each a chattel mortgage covering distinct portions of the furniture and fixtures of a hotel; that defendant Weber held a fourth, which was a blanket mortgage, covering all the property in the three mortgages and, perhaps, a little property besides, and the sheriff a levy covering all the property, whether within or without the mortgages or any of them.

An order appointing a receiver and directing him to sell the property was made upon application to the court. Thereafter the cause was tried by the court and findings made upon admissions upon the trial, substantially as alleged in the complaint, and an interlocutory judgment entered accordingly.

The orders appointing a receiver herein, and confirming his report of sale and the interlocutory judgment, were all appealed to the General Term by defendant Weber, and were affirmed.

It would appear from the records of this court that an appeal was taken from the former two orders to this court, and the appeals dismissed. (*Ostrander v. Weber*, 101 N. Y. 639.)

The property has been sold by the receiver, in pursuance of the orders directing the sale and the interlocutory judgment, and the purchase-money paid to the receiver, and possession taken by the purchaser and a final judgment entered confirming the sale and directing the disposition of the proceeds of the sale.

We think the judgment appealed from should be affirmed.

The complaint sets forth these several subjects of equitable jurisdiction, viz.: The foreclosure of chattel mortgages. (*Briggs v. Oliver*, 68 N. Y. 339; *Hart v. Ten Eyck*, 2 Johns. Ch. 99; *Thompson v. Van Vechten*, 5 Duer, 624; 36 Ill. 197-200; *Charter v. Stevens*, 3 Denio, 33; the

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determination of the extent and priority of various and conflicting liens between creditors under chattel mortgage and a judgment-creditor under levy by execution; a multiplicity of actions between such creditors. (*Suprs. v. Deyoe*, 77 N. Y. 219; *N. Y. & N. H. R. R. Co. v. Schuyler*, 17 id. 608); and the advantage of a sale of property suitable, used and adapted to a particular business, in lump, and not in separate parcels, to the end that the greatest sum may be realized for the benefit of all the creditors. (*Prentice v. Janssen*, 79 N. Y. 479-490.)

Every one of these subjects has been held sufficient to maintain an action in equity. Their combination in one complaint should not be held to defeat an equity action. It will be observed that the appellant, defendant, Weber, does not, by demurrer or in his answer raise the question that the allegations in the complaint do not make a case of equitable jurisdiction, or that the plaintiff had a remedy at law. (*Grandin v. Le Roy*, 2 Paige, 509; *Wiswall v. Hall*, 3 id. 313.) In an equity action, the defendant, in order to insist that an adequate remedy exists at law, must set it up in his answer. (*Town of Menth v. Cook*, 108 N. Y. 504.) If a court of equity has jurisdiction and entertains the case, it will ordinarily retain the case until the whole subject is disposed of. (*Taylor v. Taylor*, 43 N. Y. 578-584; *Ludlow v. Simond*, 2 Caine's Cas. 55.) Hence, if this case in its course developed any legal aspect, such as the claim that the mortgage held by the appellant Weber covered other property than that covered by the other mortgages, an order directing the sale of such property might, in this action, have been made, and was so made, at his request, that the same be sold separately, and it was so sold, for \$1. There is nothing in the findings nor in the case to show what separate property there was, or its value, and so this court cannot determine whether the purchaser made a good or bad bargain, or whether Weber was injured in the slightest degree by the sale. But its sale was within the equitable powers of the court, whether sold separately or in lump with the other, especially so when

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it was covered by the execution of the sheriff upon the Loughran judgment and execution, both of whom were parties to the action. All that Weber or any lienor can justly claim is the realization of the utmost of money possible from his security, towards paying his debt. He has, therefore, no right to insist upon a use of his security in a manner that will injure other creditors while it does not benefit himself.

The appellant seeks to review, upon this appeal, the various orders before referred to. The action being of equitable cognizance, and those orders being proper to the action and resting in the discretion of the court granting them, they cannot be reviewed in this court and are final. (*Turner v. Crichton*, 53 N. Y. 641; *Platt v. Platt*, 66 id. 360.)

Another point was argued upon the appeal. It is that the State of New York National Bank should have been made a party to the action, and would seem to have been raised for the first time upon the trial. It should have been raised by answer or demurrer. By such omission defendant Weber waives all objection on his part to the granting of the relief, except under conditions which do not exist in this case.

It nowhere appears that the bank is the assignee of any of the mortgages. It appears in the latter part of the findings that plaintiff's mortgage was given to secure the mortgagee for the indorsement of certain notes, that one of the notes so indorsed is held by the bank. The plaintiff is the trustee of the bank in respect to that note, and represents the bank to all intents and purposes. It could not, in any way, affect the rights of Weber or prevent the determination of the entire controversy in any respect.

But if these views are not sound and would not lead to an affirmance of the judgment, still the absence of an exception that the property described in the mortgage executed to John Weber, remaining unsold after sale of the first and second parcels above described, and in said order and manner, fails to raise the question as to the sale of the property not covered by the Humphey and the Sleight mortgages. That question is not presented here by any specific exception, and, therefore,

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cannot be considered. That property evidently had but trifling value, as it produced only one dollar on the sale.

The judgment should be affirmed, without costs.

All concur, except FOLLETT, Ch. J., and BROWN, J., dissenting; PARKER, J., not sitting.

Judgment affirmed.

MICHAEL H. CONNOLY, an Infant, by Guardian, etc., Respondent, v. THE KNICKERBOCKER ICE COMPANY, Appellant.

The fact that a passenger on a street car stands upon the outer platform when there is opportunity to take a seat in the car, while it will ordinarily constitute a defense in an action against the railroad company, it is not a defense in an action against another party to recover damages for negligence causing injury to the passenger.

The fact that a minor child was upon the platform of a street car in violation of a municipal ordinance, while it may be proved and is proper for the consideration of the jury in an action for negligence, does not necessarily establish negligence.

In an action to recover damages for alleged negligence causing injury to plaintiff, a child seven years old, it appeared that at the request of the conductor of a street car plaintiff turned a switch to permit the car to turn onto another street and got upon the side platform of the car with a view of getting a penny from the conductor. As the car was on the curve turning onto the other street one of defendant's wagons, which was being driven at a rapid rate, struck the end of the car causing the injury complained of. Plaintiff did not see the wagon before the collision nor look to seek if any wagon was coming. Defendant's evidence tended to show that, had the car kept straight on there would have been no collision, but that in turning, the rear end swung out into the line of the wagon wheels and that the driver of the wagon was not aware of the intention to turn the car into the other street until it was too late to avoid the collision. There was evidence, however, tending to show and justifying a finding that when the movement to turn the car was first made defendant's driver, in the exercise of reasonable care, could have slackened the speed of the wagon, and by doing so the collision would have been avoided. *Held*, that the question of plaintiff's negligence and of contributory negligence on the part of defendant was properly submitted to the jury.

(Argued March 26, 1889; decided April 16, 1889.)

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APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 9, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

The nature of the action and the material facts are stated in the opinion.

Alfred E. Mudge for appellant. Plaintiff was chargeable with some degree of care and prudence, and with some degree of negligence. (*Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 420; *Clark v. E. A. R. R. Co.*, 36 id. 135.) The fact that he was doing an act prohibited by the statute (Chap. 585, Laws of 1880), was evidence of negligence on his part which he was bound to overcome. (*Knupple v. Knick. Ice Co.*, 84 N. Y. 488.) As the plaintiff failed to rebut the presumption of negligence raised by the testimony against him, the complaint should have been dismissed. (*Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 420; *Solomon v. C. P. R. R. Co.*, 1 Sweeney, 298; *Motel v. S. A. R. R. Co.*, 2 How. Pr. 30.)

A. J. Skinner for respondent. Even if the plaintiff had been, as a matter of fact, violating the statute at the time he was injured, that of itself would not operate to deprive him of any right of action against defendant. (*Packalinsky v. N. Y. C. & H. R. R. Co.*, 82 N. Y. 424; *Connelly v. N. Y. C. & H. R. R. Co.*, 88 id. 346; *Wohlfahrt v. Beckert*, 92 id. 490; *Platz v. City of Cohoes*, 89 id. 220; *Carroll v. S. I. R. R. Co.*, 58 id. 126; *Eppendorf v. B. C. & N. R. R. Co.*, 69 id. 195; *Spooner v. B. C. R. R. Co.*, 54 id. 230.) At most, the statute was competent only as evidence to be submitted to the jury on the question of negligence. (*Rochester v. Montgomery*, 72 N. Y. 65.) A person driving a team and vehicle on the track of a horse railroad is bound to exercise greater care in keeping out of the way of cars than is required of one driving along a common highway or street in avoiding

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ordinary vehicles; he owes a greater duty and his right is smaller. (*Adolph v. C. P., N. & E. R. R. Co.*, 76 N. Y. 530, 537.)

BRADLEY, J. This action was brought to recover damages resulting from personal injuries suffered by the plaintiff, alleged to have been occasioned by the negligence of the defendant. The injury was caused by a collision on Court street, in the city of Brooklyn, between a street car and the ice wagon of the defendant. The wagon was going one way and the car the other, and, as the car was turning from that street into another street, a wheel of the wagon came in collision with the rear end of the car, and the plaintiff was thrown from the side platform near that end of the car on which he was standing. The question of negligence of the defendant was, perhaps, a close one, but the evidence seems to have been such as to permit that imputation, and required the submission of such question to the jury as one of fact. Both the wagon and the car were properly in the street, and the duty was with the driver of each to use reasonable care against injury to others. In this instance they approached each other at or near the junction of Court and Nelson streets, and the car was on the curve, proceeding to turn into the latter street, when it was struck by the wagon.

The main evidence of negligence of the defendant was that relating to the speed it was being driven. There is evidence tending to prove that it was going rapidly, and continued to do so until the collision occurred. It is, however, said, with the support of evidence tending to prove the fact, that if the car had continued in Court street there would have been no collision; that the driver was not aware of the purpose to turn into the other street until both reached Nelson street, and that then it was too late for the driver of the wagon to avoid the collision caused by the swinging of the rear end of the car into the line of the wheels on one side of the wagon in making the turn, and that the driver did what he then could to get the wagon out of the way of the car.

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Upon evidence given on the part of the defendant, if taken by the jury as a full and correct representation of the situation, they could not properly have charged the defendant with liability. But the jury were permitted, upon evidence given upon the trial, to find that when the movement was first made to turn the car, the defendant's driver influenced by reasonable care, and in view of the situation and exercising it, may and should have slackened the speed of the wagon, and by doing so the collision and the consequences resulting from it would have been avoided. And that, while the driver did not know or suppose, until the car reached the intersecting street that it would be turned into it, the switch there would, if observed, have shown the opportunity to do so. The evidence on the part of the plaintiff and the inferences fairly derivable from it permitted the conclusion that the collision was caused by the negligence of the defendant's servant who was driving the wagon. The further question is, whether it appeared that the plaintiff exercised the care required of him. The burden was with him to make it so appear by evidence. He was then of the age of seven years, and was chargeable with the duty of exercising such degree of care as could reasonably be expected of one of his age, which, in view of all the circumstances, was properly for the consideration of the jury upon the question of contributory negligence. (*Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289; *Byrne v. N. Y. C. & H. R. R. Co.*, 83 id. 620; *Thurber v. H. B. M. & F. R. R. Co.*, 60 id. 326.)

There was some conflict of evidence in relation to the circumstances under which the plaintiff got on to the car, but the finding was permitted by it, that the plaintiff, as he had done on one or more occasions before, appeared at the switch, turned it to enable the car to go from Court into Nelson street, that he did so by the request of the conductor, who told him to do it and get on the car; that the plaintiff did so with a view to obtaining from the conductor a penny, and that while he stood on the platform waiting for it, the collision occurred which caused the injury. The plaintiff says he did not see the

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wagon, nor did he look to see if any wagon was coming. The car was then turning on its way into Nelson street. He took no observation to see whether there was any danger to come from collision of the car with anything passing on the street. As matter of law, it cannot be said that he was required to apprehend that there might be an occurrence of that character, or that he might be subject to such a cause of danger. So that the failure to look for approaching vehicles on the street was not necessarily negligence on his part. The fact that a passenger on a street car stands upon the outer platform when there is opportunity to take a seat in the car, might, in an action against the railroad company to recover damages as for its negligence under ordinary circumstances, constitute a defense. (*Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135.) But that may not be so when the action is against another party, as the defendant in such case cannot assert as a defense the mere duty of the passenger in his relation as such to the railroad company. We think the question of contributory negligence of the plaintiff was for the jury. And they were permitted upon the evidence to find that the negligence of the defendant was the sole cause of the injury. The motion for nonsuit was, therefore, properly denied, unless, as suggested by the defendant's counsel, the plaintiff was chargeable with such negligence by force of the statute, which provides that no minor child not being a passenger, shall be allowed upon the platform or steps of any street car, and that it shall be the duty of constables, etc., to arrest any child violating such provision, who upon conviction, shall be punished by fine not exceeding five dollars for the offense. (Laws of 1880, chap. 585.) While the violation of such statute may be proved as a fact for consideration by the jury, such violation does not for all purposes necessarily establish negligence. (*Knupple v. Knickerbocker Ice Co.*, 84 N. Y. 488.) The getting upon the car was not the immediate cause of the plaintiff's injury, and assuming that the plaintiff violated the statute, he was not for that reason denied the right to assert the defendant's negligence as the cause of the injury and charge it with liability as the consequence. (*Car-*

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roll v. Staten Island R. R. Co., 58 N. Y. 126; *Platz v. City of Cohoes*, 89 id. 220.) In this case, the finding was warranted that the plaintiff got on to the car, not as a passenger, but temporarily, by the invitation of the conductor.

None of the defendant's exceptions were well taken.

The judgment should be affirmed.

All concur, except POTTER, J., dissenting and BROWN, J., not sitting.

Judgment affirmed.

**AMELIA GALL, Respondent, v. CHARLES F. GALL et al.,
Appellants.**

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130	163

114	109
137	663

A mutual agreement between competent parties to take each other for husband and wife constitutes a valid marriage, even if not in the presence of witnesses.

Such a marriage may be proved by showing actual cohabitation as husband and wife, acknowledgment, declarations, conduct, repute, reception among neighbors and relations, etc.

Where it appears that the intercourse was illicit at first, but was not accompanied by any of the evidences of marriage, and subsequently it assumed a matrimonial character and was surrounded by the evidences of a valid marriage above named, a question of fact is presented for the determination of a jury.

The provision of the Revised Statutes (2 R. S. 139, § 6) permitting a person already married to marry again, where the former husband or wife has absented himself or herself for five successive years without being known by such person to be living during that time, and declaring the second marriage to be void only from the time its nullity shall be pronounced by a court of competent jurisdiction, is based upon the probability that in such case the absentee is dead, and is designed to protect the person, who, in good faith, acts upon the statute.

The mere fact that a wife has absented herself for five years, and that her husband has not heard from her in that time, does not justify him in marrying again; it must appear that he acted as a reasonable man desiring to act in good faith would have acted under the circumstances.

Where, therefore, it appeared that a wife left her husband shortly after marriage, which occurred in 1865, and articles of separation were signed by them; that he never saw her afterward and believed the articles of separation were a divorce; that he heard she was dead in 1870; that he married again in 1871; that his former wife was living in 1878; that he

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never, except on one occasion, inquired to ascertain where she was, although he continued to live in the same neighborhood with her relatives and was acquainted with some of them; that he told his second wife, both before and after he married her, that his former wife was living, but that he had a divorce from her, *held*, the evidence justified a conclusion that the man in marrying again did not act in good faith; and so that the second marriage was void.

Where a court has received improper evidence in a civil action, under objection and exception, it may remedy the error by striking out the evidence of its own motion.

Erben v. Lorillard (19 N. Y. 299); *People v. Smith* (104 id. 491) distinguished.

(Argued March 14, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 13, 1887, which affirmed a judgment in favor of plaintiff, entered upon the verdict of a jury, and affirmed an order denying a motion for a new trial.

This was an action to admeasure dower. The plaintiff, in her complaint, alleges "that she is the widow of Joseph Gall, deceased." The denial of this allegation by the defendants, Charles F. Gall and others, raised the only material issue of fact in the action.

The facts, so far as material, are stated in the opinion.

John E. Parsons for appellants. To bring the fact that Lena Pfeiffer absented herself from Jerman for more than five years, within the statute, all that was required was good faith on Jerman's part. Good faith did not require Jerman to hunt for her. (*Jones v. Zoller*, 29 Hun, 551, 554; 32 id. 280, 283.) The fact that Jerman did marry the plaintiff is of itself conclusive of his good faith. The presumption is that he would not commit a crime. (1 *Greenleaf on Evidence*, § 35; *Clayton v. Wardwell*, 4 Comst. 230, 237; *Nesbit v. Nesbit*, 3 Dem. 329.) Jerman's knowledge that Lena was alive was a fact, and this fact could not be proved by the mere declaration of Jerman himself. (*Gandolpho v. Appleton*, 40 N. Y. 533, 538-540; *Gardner v. Barden*, 34 id. 433, 438; *Paige v. Cagwin*, 7 Hill, 361, 368; *Phillips v. Thompson*, 1 Johns. Ch. 131, 139; *Benjamin v. Smith*,

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⁴ Wend. 332, 336; *Woodward v. Paine*, 15 Johns. 493; *Piggins v. People*, 4 Hun, 540, 543.) The intent or belief under which plaintiff left Jerman, in 1875, was no part of the *res gestae* of her marriage to him in 1871, and did not form the motive of any act of his or her inducing that marriage. The naked fact that she left him in 1875 proves nothing and is wholly immaterial, and the alleged belief that induced that act cannot be said to be more material than the act itself. (*Brown v. Champlin*, 66 N. Y. 214, 221; *McCormack v. Perry*, 47 Hun, 71, 74; *Nichols v. K. I. O. Co.*, 56 N. Y. 618; *Schultz v. T. A. R. Co.*, 89 id. 242, 250; *Morgan v. Frees*, 15 Barb. 352; *Briggs v. Wheeler*, 16 Hun, 583, 584; *Burns v. City of Schenectady*, 24 id. 10; *Marston v. Gould*, 69 N. Y. 220, 228; *Church v. Howard*, 79 id. 415, 421; *Dilleber v. Home Life Ins. Co.*, 69 id. 256, 260; *Vallean v. Vallean*, 6 Paige, 207-209; *McCallan v. Brooklyn C. R. R. Co.*, 48 Hun, 340; *Stokes v. People*, 53 N. Y. 164, 176; *Harris v. Wilson*, 7 Wend. 57, 62; *Bush v. Hewitt*, 4 N. Y. Leg. Obser. 384; *Moore v. Hitchcock*, 4 Wend. 292; *Paige v. Cagwin*, 7 Hill, 361, 368, 369; *Gardner v. Barden*, 34 N. Y. 433, 438; *Gandolfo v. Appleton*, 40 id. 533, 538, 539, 540; *Hill v. Burger*, 3 Bradf. 454; 2 R. S. 143, § 30; *Badger v. Badger*, 88 N. Y. 546, 556, 558; *Van Tuyl v. Van Tuyl*, 57 Barb. 241; 9 Paige, 614; *Meichum v. State*, 11 Ga. 615; Starkie on Ev. [8th Am. ed.] 89; *Clayton v. Wardell*, 4 N. Y. 230; *Jewell v. Jewell*, 1 How. [U. S.] 219, 230; *Montgomery v. Montgomery*, 3 Barb. Ch. 132; Abb. Tr. Ev. 81, 82, § 19; *In re Taylor*, 9 Paige, 611, 616; *Shedden v. Patrick*, 30 L. J. P. M. & D. 217-223; *Erben v. Lorillard*, 19 N. Y. 299, 302, 303; *Anderson v. R. W. & O. R. R. Co.*, 54 id. 334, 341; *O'Sullivan v. Roberts*, 39 N. Y. Supr. Ct. 360; *Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274, 280; 17 Abb. N. C. 502.)

A. Simis, Jr., for respondent. Proof of matrimonial cohabitation, declaration of the parties and reputation that

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they are man and wife, is sufficient upon which to found a presumption of marriage. The courts of this state have gone very far in indulging such a presumption from cohabitation and reputation. (*Betsinger v. Chapman*, 88 N. Y. 499; *Badger v. Badger*, Id. 546, 254; *O'Gara v. Eisenlohr*, 38 id. 296; *Hynes v. McDermott*, 91 id. 451, 457, 459; *Fenton v. Reed*, 4 Johns. 52; *Piers v. Piers*, 2 H. of L. Cas. 331; *De Thoren v. Attorney-General*, L. R., 1 App. Cas. 686; *Rose v. Clark*, 8 Paige, 572; *Starr v. Peck*, 1 Hill, 270; *Jackson v. Claw*, 18 Johns. 346; *Canjolle v. Ferrie*, 23 N. Y. 554; *Vermilyea v. Palmer*, 52 id. 476.) As between Jerman and Lena Pfeiffer, the former's subsequent marriage to plaintiff is voidable; as between the plaintiff and Jerman their marriage is void. (2 R. S. 138, §§ 5, 6; *Kinney v. Kinney*, 7 Daly, 461, 463; *O'Gara v. Eisenlohr*, 38 N. Y. 301; *Downs v. N. Y. C. R. R. Co.*, 56 id. 664.) "Reputation," in its application to the fact of marriage, is more than mere hearsay; it involves and is made up of social conduct and recognition, giving character to an admitted and unconcealed cohabitation. (*Badger v. Badger*, 88 N. Y. 556.) Plaintiff had a right to rely upon Jerman's representation that he had been divorced. (*Blossom v. Barrett*, 37 N. Y. 436; *Couriland v. Herkimer Co.*, 44 id. 22.) Plaintiff's marriage to Jerman being a nullity, her failure to disclose the marriage to Mr. Gall would not be a fraud to vitiate her marriage contract with him. (1 Bishop on Mar. and D. § 176.)

VANN, J. By this action, the plaintiff alleging that she was the lawful wife of one Joseph Gall, deceased, sought to recover dower in the lands of which he died seized. As she made no effort to prove a ceremonial marriage between herself and Mr. Gall, the decision of the issue turned primarily upon the inference to be drawn from certain acts and declarations of the parties and their marital reputation among their acquaintances.

The competency of the plaintiff to contract marriage with Mr. Gall was questioned upon the ground that she had been

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previously married to one John Jerman, who was still living, undivorced, at the time of the trial. It was conceded that she had no right to marry Mr. Gall, provided her marriage to Mr. Jerman was valid. This depended upon the competency of Jerman to marry, as he had a living wife, Helena, from whom he had not been divorced at the time he married the plaintiff. The competency of Jerman to marry the plaintiff rested upon that provision of the Revised Statutes which permits a man, already married, to marry again, provided his former wife shall have absented herself for the space of five successive years without being known to him to be living during that period. (3 R. S. [7th ed.] 2332, § 6.)

Thus upon the trial there arose three questions of fact, which were submitted to a jury for decision in the following form :

1. Did Helena Jerman, the first wife of John Jerman, absent herself for the space of five years prior to the marriage of Jerman to the plaintiff, within the meaning of the statute upon that subject ?

2. Was said Helena Jerman known to John Jerman to be living during the period of five years immediately preceding his marriage to the plaintiff ?

3. Did the plaintiff and Joseph Gall, deceased, at any time between the month of February, 1883, and the decease of said Gall intermarry ?

The jury after answering the first question in the negative, and the second and third in the affirmative, found a general verdict for the plaintiff.

The first question presented for decision is whether, within the rules governing appeals to this court, there was sufficient evidence to support the findings of the jury. The determination of this question requires a somewhat extended examination of the facts as the jury may be presumed to have found them.

Joseph Gall died May 22, 1886, in the eighty-second year of his age. He married in early life, and his wife, after living

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with him for many years, died on the 23d of February, 1883, leaving no children. The plaintiff, under the name of Anelia Stieb, was employed in the family as an ordinary servant from 1877 until the death of Mrs. Gall, and after that event she continued to serve Mr. Gall for a time in the same capacity at his residence, No. 4 Rutherford place, in the city of New York. During this period the outward relations, at least, between Mr. Gall and the plaintiff were simply those of master and servant. She cooked his meals and kept his house, but did not sit at his table nor, apparently, have ~~any~~ unusual privilege. During the spring or summer of 1883, however, a criminal intimacy sprang up between them, and in the fall, believing that she was pregnant by him, he requested his physician to make a physical examination, which resulted in the discovery that she was with child. He thereupon gave up his establishment at No. 4 Rutherford place and took rooms at the Westminster Hotel, while she removed to a tenement-house where he supported her and furnished her with a servant. In February, 1884, the plaintiff was delivered of a daughter, of whom he acknowledged in many ways that he was the father. In May, 1884, he moved her to a house in Brooklyn, recently purchased by him for the purpose, where she lived with her mother, brother and sister, all supported by him.

He stated at the time, to one person, that he bought this house for his wife and child, and to another that he bought it for his family. Previously he had called plaintiff's mother "Mrs. Stieb," but after this he habitually called her "mother," and once told her that the plaintiff was his wife. In May, 1884, he went to Europe, returning in July, when he resumed his rooms at the Westminster, and thereafter, until March, 1886, he visited the plaintiff at the house in Brooklyn from one to three times a week, generally remaining over night, and usually from Saturday evening until Monday morning. They occupied the same bed, ate at the same table, and all of their apparent relations were those of husband and wife.

From the time the plaintiff began to live in the Brooklyn

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house until the date of his death, he treated her in that locality as his wife, and she was reputed in that neighborhood to be his wife. He introduced her as such to the neighbors; spoke to her and of her to servants and others having business in the house as his wife; referred mechanics to "Mrs. Gall" for further particulars in making repairs that he had ordered; directed plumbers to do whatever his wife ordered and said that he would pay for it; and said to plaintiff's sister and her husband, as he gave them a present on their wedding anniversary, "this is a small present from myself and wife." On one occasion Mr. Gall, the plaintiff, and the child were at Rockaway Beach, and as he was dancing around with the child the people were making remarks about it, and asked him whether that was his child, when he answered "yes, that is my child and there is my wife." A few months before his death he said to his partner in business that he was not going to Europe that year because he expected an increase in the family, and, on being asked if he was actually married to the plaintiff, said that he had taken legal advice on the matter and that according to the laws of the state of New York he was married to her. When urged, on the same occasion, to have a ceremony performed for the sake of the children, "one living, one coming," he said that he did not care to make his private affairs public. In March or April, 1886, he left his rooms at the hotel and moved his furniture to the house in Brooklyn, stating that he went there to reside permanently and thenceforward he did reside there until his death.

It was conceded that while Mr. Gall was at the Westminster Hotel he lived by himself without any relations to the plaintiff or her family, so far as his life there was concerned.

His old acquaintances, many of them persons of position, supposed that he was a widower. Aside from his business partner he does not appear to have told any of them that the plaintiff was his wife. Only one other of his old friends, however, seems to have known that he cohabited with her, and he said nothing to him upon the subject, although he was the physician employed by Mr. Gall to attend the plaintiff

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upon the birth of the child. To a few of his old acquaintances, who did not know of his intimacy with her or that he had had a child by her, he spoke of the plaintiff as his cook or his housekeeper. He did not take her to see his relatives or old friends or to the places which he frequented. On one occasion when joked about getting married again, he said that he would not marry the best woman who ever trod in shoe-leather; and on another, that he would not marry the best girl that ever lived. To one person he said that he was a married man, but his wife was dead; and to another, about six weeks before his death, that he should never marry again. He made other declarations of like character, but none of the persons to whom these statements were made appear to have known of the plaintiff's existence.

Prior to leaving Rutherford Place on the 1st of January, 1884, the plaintiff disclaimed being Mrs. Gall. She did not attend the funeral of Mr. Gall, but she was advised not to on account of her condition, being that of advanced pregnancy. The second child, also a daughter, was born in July, 1886, about two months after the death of Mr. Gall, who, before he died, said that he was the father of the unborn child.

In October, 1882, Charles Funckenstien, a nephew of Mr. Gall, came from California at his request, to live with him. In April, 1883, by due course of procedure, the name of Mr. Funckenstien was changed, at his uncle's desire, to Charles F. Gall, and thereafter he was known as the adopted son of Joseph Gall. April 3, 1883, Mr. Gall made his will, in which he directed that his body should be buried by the side of his beloved wife Elizabeth Ann, and after making certain bequests, gave all the rest of his property to his nephew Charles Funckenstien. April 28, 1884, by a codicil to said will, he bequeathed \$1,000 to "Amelia Stieb, servant of my late wife," and \$5,000 "to the child of said Amelia, Betsey A. Gall, now of the age of two months."

In August, 1871, the plaintiff was married to John Jerman, knowing that he had been married before, but believing that he was divorced. She lived with him until 1875, when,

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learning that he had not been divorced, she left him. Jerman was married to Helena Pfeiffer on October 28, 1865, and lived with her about two weeks, when she left him. Six months later he found her in a house of assignation, and shortly afterward they met at the office of a lawyer, who prepared articles of separation which they signed in the presence of witnesses and each took a copy. He never saw her again, but believed that the articles of separation were a divorce. In 1870 he heard that she was dead. In fact she was living as late as 1873, two years after his marriage to the plaintiff, and was seen during that year in Indianapolis and New York. She was also seen in New York in 1866, about one year after the separation, but, except as mentioned, she seems to have "disappeared entirely out of her former family relations." She led a loose life and wandered from place to place. Jerman never inquired to find out where she was, except on one occasion, when he asked an acquaintance, who said that he did not know anything about it. He continued to live in the same neighborhood as when he married Helena and knew her brothers and sisters, her aunt and cousin and others of her relations, and where some of them lived. He heard once that her family had moved west, but made no effort to find out about them or about her. He told the plaintiff, both before and after he married her, that Helena was living, but that he had a divorce from her. There was some conflict in the evidence. The plaintiff and some of her witnesses were somewhat discredited, but as all questions of credibility were exclusively for the jury, they were warranted in finding the facts as already stated.

Did these facts authorize the jury to draw the final inferences necessary to uphold their verdict?

The cohabitation, apparently decent and orderly, of two persons opposite in sex, raises a presumption of more or less strength that they have been duly married. While such cohabitation does not constitute marriage, it tends to prove that a marriage contract has been entered into by the parties. Where, however, the cohabitation is illicit in its origin, the

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presumption is that it so continues until a change in its character is shown by acts and circumstances strongly indicating that the connection has become matrimonial. It is sufficient if the acts and declarations of the parties, their reputation as married people and the circumstances surrounding them in their daily lives, naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife. (*Caujolle v. Ferrie*, 23 N. Y. 90; *O'Garu v. Eisenloher*, 38 id. 296; *Badger v. Badger*, 88 id. 546, 554; *Hynes v. McDermott*, 91 id. 451, 457.)

A present agreement between competent parties to take each other for husband and wife constitutes a valid marriage, even if not in the presence of witnesses. (*Clayton v. Wardell*, 4 N. Y. 230; *Caujolle v. Ferrie, supra*; *Brinkley v. Brinkley* 50 id. 184, 197.) Such a marriage may be proved by showing actual cohabitation as husband and wife, acknowledgment, declarations, conduct, repute, reception among neighbors and relations and the like. And where the intercourse was illicit at first, but was not then accompanied by any of the evidences of marriage, and subsequently it assumes a matrimonial character, and is surrounded by the evidences of a valid marriage above named, a question of fact arises for the determination of the jury. They are to weigh the presumption arising from the meretricious character of the connection in its origin with the presumption arising from the subsequent acknowledgment, declarations, repute, etc., and decide whether all of the circumstances taken together are sufficient evidence of marriage.

The application of these principles to the facts of this case leaves no doubt that the jury was warranted in finding that the plaintiff and Mr. Gall were married. The only evidence of the time when their intercourse began is the pregnancy of the plaintiff, discovered in August or September, 1883. They were not then living together as husband and wife, but as master and servant. She did not sit at his table nor, so far as was known, sleep in his bed. They had not held themselves

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out as married, nor made any acknowledgment or declaration upon the subject. Neither their conduct nor reputation in any way indicated a married relation. The connection was purely licentious, and its only effect was to destroy the presumption of innocence when they began to openly cohabit.

Contrast this state of affairs with that which existed just before the death of Mr. Gall. They were then openly living together as husband and wife, and were recognized as such by the mother, brother and sisters of the plaintiff, by the physician, the neighbors and by all who had either social or business relations with them. A child had been born to them, who bore his name, at whose baptism he was present, and whom in every way he acknowledged as his daughter. Neither of them had any home other than that where they openly lived together with their child as a family. He called her his wife in the presence of others, said she was his wife in her absence and told his old partner in business that according to law they were married. He volunteered to acknowledge both wife and child when there was no occasion to say anything to save appearances. All of the circumstances surrounding them tended to show that they were married. One fact which affected him only, and hence was immaterial, was inconsistent with the presumption of marriage. He passed as unmarried with his old friends and acquaintances, possibly because he did not wish them to know that he had married his cook. But it was held in *Badger v. Badger (supra)*, that evidence of divided repute must be confined to those who have knowledge of the cohabitation, and that proof that a man was reputed to be unmarried, given by his friends, who knew nothing of the putative wife or of the fact of cohabitation, was mere hearsay. The reputation of Mr. Gall at the Westminster Hotel, therefore, did not tend to explain the character of his cohabitation with the plaintiff.

The competency of the plaintiff to marry Mr. Gall is an important question, depending upon the competency of Jermain, her first husband, to marry her, as he had a living wife. The statute covering the subject is as follows, viz.: "If any

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person whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority."

Assuming that the declaration of Jerman that his first wife was alive was incompetent evidence to establish the fact that she was not known to him to be living during the statutory period, still, as no objection was made, it was not error to receive it. The defendants, however, insist that there was no other evidence upon the subject, and that a verdict resting only upon incompetent evidence, even if received without objection, should not stand. But, as Jerman's first wife was, in fact, alive at the time that he married the plaintiff, the question of fact still remained whether he acted in good faith in contracting a second marriage. The section quoted seems to be based upon the probability that the absentee is dead, and is apparently designed to protect the person who, in good faith, acts upon the statute, from evil results if the absentee is actually living. The first marriage is suspended, or, as was held in *Griffin v. Banks* (24 How. 213), it is "placed in abeyance," but it is not reinstated by the return of the absentee, because the second marriage becomes void only from the time that it is so declared by a competent court. Otherwise both marriages would be in force at the same time and, to this extent, polygamy would be sanctioned by law. The first marriage ceases to be binding until one of the three parties to the two marriages procures a decree pronouncing the second marriage void. (3 R. S. [6th ed.] 142, §§ 36, 37; Code of Civ. Pro. § 1745.) A statute with such possibilities should be so construed as to promote good order, and the person availing himself of its privilege should be required to act in perfect good faith. (*Jones v. Zoller*, 32 Illin. 280, 282; *Cropsey v. McKinney*, 30 Barb. 47; *McCartee v. Camel*, 1 Barb. Ch. 455, 464.) He decides the question as to his right to remarry for himself, without application to any court or public authority. The whole responsi-

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bility rests upon him. He cannot shut his eyes and ears and justify a second marriage because for five years he did not hear of his wife. Did he try to hear of her? Did he honestly believe she was dead? Did he make inquiry? Were the circumstances such that a reasonable man, honestly desiring to learn the truth, would have made inquiry? Was he excused from inquiring by a false report of her death? Questions of this character are involved in the ultimate question of good faith, which is necessarily for the jury, as it depends upon the inferences to be drawn from a great many circumstances.

In this case it was their duty to determine whether Jerman, in deciding that he had the right, relying upon the statute, to marry again, acted as a reasonable man, desiring to act in good faith, would have acted under the same circumstances. Whether he relied upon his supposed divorce, or upon the report that his wife was dead, instead of upon the statute, was for the jury to say. They were also to consider his opportunity for making inquiries and the effect of his omission to do so. The facts warranted their conclusion that he did not act in good faith, and hence that his marriage to the plaintiff was void.

We have examined the exceptions relating to evidence and find but one that requires attention. The court received in evidence, against objection and exception, the inscription "J. G. to A. S." upon a ring proved to have been worn by the plaintiff in the spring of 1883, but which the testimony did not connect with Mr. Gall. The court, of its own motion, struck the evidence out and excluded the ring. We do not think this was error. The evidence was stricken out immediately after it was received and before it had had time to produce any permanent impression upon the minds of the jury. Even when great care is used upon a trial, incompetent evidence will occasionally creep in. A witness may make a voluntary statement, or an answer that is not responsive, or the trial judge may admit something the exact bearing of which he fails at the moment to perceive. Cannot this be remedied

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by striking it out? Must the court stop in the midst of a long trial and discharge the jury because it is possible that the jurors, in violation of their duty, may give heed to evidence which is no longer in the case, but which was promptly struck out in their presence? Such a rule would seriously impede public business and lead to needless multiplication of trials. It would be opposed to the modern tendency both of legislation and judicial decisions. (*Platner v. Platner*, 78 N. Y. 90; *Pontius v. People*, 82 id. 339.)

We are referred to *Erben v. Lorillard* (19 N. Y. 299), but in that case the incompetent evidence was not struck out, although the judge in charging the jury told them to pay no attention to it. In *People v. Smith* (104 N. Y. 491), a capital case, the danger of prejudice to the defendant was much greater than it was in the case under consideration. While it is the better practice, in addition, to striking out the evidence, to carefully instruct the jury to disregard it, still as no request was made that this should be done, the defendant cannot predicate error upon that omission.

The judgment should be affirmed.

All concur, except HAIGHT and PARKER, JJ., dissenting, and BROWN, J., not voting.

Judgment affirmed.

THE TOWN OF SOLON, Appellant, v. THE WILLIAMSBURGH SAVINGS BANK, Respondent.

In the petition presented to the county judge in proceedings to bond a town under the town bonding act of 1869 (Chap. 907, Laws of 1869), the petitioners described themselves as "representing a majority of the taxpayers of the town." The affidavit of verification attached to the petition stated that "the persons signing said petition are a majority of the taxpayers." In an action by the town to have bonds of the town, issued by the commissioners appointed in said proceedings, adjudged void, and that they be delivered up and canceled, held, that the word "representing" did not necessarily import that the majority did not themselves sign, but did it through agents representing such taxpayers; that it might be treated as having reference to the term "majority," not to the persons

114	122
114	528
114	122
138	473
114	122
138	360
114	122
140	268

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constituting it; and, as it appears that the word was used in various places in the act in that sense, this was a legislative interpretation of it for the purposes of the act; and so, the statement was to be considered as declaring that the subscribers were a majority of the taxpayers.

The attestation clause to each bond stated that the commissioners "have set their hands and seals" thereto. The commissioners signed as such, and opposite each was the scroll "[L. S.]". Held, that this could not be considered as a seal; but that the omission of a seal did not defeat the enforceable validity of the bonds; at least, that as it appeared that the commissioners intended to properly and effectually execute the bonds, and the omission was by misunderstanding, mistake or inadvertence, a court of equity might afford relief to a person justly entitled to the benefit of the instrument.

Defendant was a *bona fide* purchaser for a valuable consideration of the bonds in question. When they came to its hands seals had been affixed, covering the scrolls. This it appeared had been done after they had been transferred by the railroad company, to whom they were delivered by the commissioners, and before they came to the hands of defendant. Held, that, conceding the presumption was that the seals were affixed by some party interested and that the burden of proof would be upon the one seeking to enforce the bonds to explain the alteration, that rule was not applicable in an equitable action to have the security canceled because of the alteration when it appeared defendant was in no sense chargeable with *mala fides*; that the bonds were not necessarily invalidated by the addition of the seals, treating it as a material alteration, and it could not be presumed that the alteration was fraudulently made; and that upon the facts appearing it did not entitle plaintiff to the relief sought.

It seems that the reference in the attestation clause to the seals, as affixed with the addition of the scroll, does not justify an inference of authority to any holder of the bonds to affix the requisite seals.

After the amount of bonds authorized was issued to the president of the railroad company, he surrendered a portion of them to the commissioners, and they in place thereof delivered to him a like amount of bonds of larger denominations and made payable in a different place, of which those held by defendant are a part. The returned bonds were destroyed by the commissioners. Held, that, assuming the power of the commissioners to issue bonds was exhausted with the original issue, yet as they represented the town and were in some sense its agents, and as it appeared that the town had for several years paid the interest coupons upon them, there was no equity to support an action for their cancellation against a *bona fide* holder who had purchased in reliance upon the authority with which the commissioners were lawfully clothed.

Horton v. Town of Thompson (71 N. Y. 513), distinguished.

(Argued March 12, 1889; decided April 16, 1889.)

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APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 10, 1888, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

Esek Cowen for appellant. The county judge acquired no jurisdiction to render the judgment put in evidence, because the petition did not contain the necessary jurisdictional averments. (Laws 1869, chap. 907; *People v. Smith*, 45 N. Y. 783-784; *Merritt v. Village of Port Chester*, 71 id. 312; *Shattuck v. Bascom*, 76 id. 39; *People ex rel. Rogers v. Spencer*, 55 id. 1; *People ex rel. Green v. Smith*, id. 135; *Town of Wellsborough v. N. Y. C. & H. R. R. R. Co.*, 76 id. 182; *Craig v. Town of Andes*, 93 id. 405.) The bonds issued by the commissioners were unsealed, and the addition, without the consent or authority of the town of seals, after they had parted with the bonds, was a material alteration which made them void even in the hands of holders for value. (*Warren v. Lynch*, 5 Johns. 239; *Curtis v. Leavitt*, 17 N. Y. 545-546; *Andrews v. Herriott*, 4 Cowen, 508; *Bank of Rochester v. Gray*, 2 Hill, 227; *Olderson v. Langdale*, 3 B. & A. 660; *Burchfield v. Moore*, 3 E. & B. 688; *Gardner v. Walsh*, 32 Eng. L. and Eq. 162; *Chappell v. Spencer*, 23 Barb. 584; *Perring v. Howe*, 4 Bing. 28; *Abbe v. Rude*, 6 McLean, 106; *Jackson v. Osborn*, 2 Wend. 556; *Knight v. Clemens*, 8 Ad. & Ell. 215; *Tillou v. C. & E. M. Ins. Co.*, 7 Barb. 564; *Wild v. Armsby*, 6 Cush. 314; *Burdick v. Westcott*, 2 Barb. 374; *Waring v. Smith*, 2 Barb. Ch. 119; *Simpson v. Davis*, 119 Mass. 269, 270; *Willett v. Shepard*, 34 Mich. 106; *Herrick v. Nolan*, 22 Wend. 388; *Metropolitan Life Insurance Co. v. McCoy*, 41 Hun, 144; *Meyer v. Hunecke*, 55 N. Y. 417; *Barnet v. Abbott*, 53 Vt. 128, 129; *Clute v. Small*, 17 Wend. 238.) The new issue of bonds to the amount of \$24,000, made for different amounts

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than the ones destroyed, and payable at a different place, was beyond the power of the commissioners, was illegal and unauthorized, and the bonds are absolutely void in the hands of any purchaser. (*City of Buffalo v. McKay*, 15 Hun, 204; *Hadley v. Mayor, etc.*, 33 N. Y. 603; *People v. Woodruff*, 32 id. 355.) The taxpayers of the town of Solon were not estopped by the fact that the coupons on these bonds had been paid by taxation for several years before this action was brought. (*People v. Batcheller*, 53 N. Y. 128; *Horton v. Town of Thompson*, 71 id. 513.) Plaintiff is entitled to equitable relief, as there are a large number of these bonds in the hands of the defendant; they may be sold to different parties and lay the foundation of numerous suits against the town, and their invalidity does not appear, either on the face of the bonds or on the face of any proceedings, which the holders would be obliged to prove in order to recover. (*W. R. R. Co. v. Bayne*, 75 N. Y. 1; *Town of Springport v. Teutonia Sav. Bank*, id. 397; *N. Y. & N. H. R. R. Co. v. Schuyler*, 17 id. 592; *Town of Wellsborough v. Teutonia Sav. Bank*, 76 id. 182.)

Isaac S. Newton for respondent. There was not an issue of Solon bonds beyond the limit of the statute. (*Westfall v. Preston*, 49 N. Y. 249; *Mygatt v. Washburn*, 15 id. 316; *Clark v. Norton*, 49 id. 243; *People v. Hewitt*, 65 id. 275; *People v. Suffern*, 68 id. 321.) The provision of the statute for sealing the bonds was merely directory. (Cooley's Const. Lim. 77, 78; *Draper v. Town of Springport*, 104 U. S. Rep. 501; Potter's Dwarris on Stat. 224, 226; *People v. Cook*, 8 N. Y. 67, 92, 93; *Marchant v. Langworthy*, 6 Hill, 646; *Rex v. Loxdale*, 1 Burrows, 447; *Wood v. Chapin*, 13 N. Y. 509; *Thomson v. Sergent*, 15 Abb. 452; *Grandin v. Lamore*, 29 Hun, 399; *Ex parte Heath*, 3 Hill, 42-47; *Torrey v. Millbury*, 21 Pick. 67; *People v. Allen*, 6 Wend. 586; *People v. Gardner*, 24 N. Y. 586, 587; *Cunningham v. Cassidy*, 17 id. 276; *Supervisors v. Galbraith*, 99 U. S. 214; *Indianapolis R. R. Co. v. Hurst*, 93 id. 291; *Rock Creek v. Strong*,

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96 id. 271; *Shaw v. Tobias*, 3 N. Y. 188, 193; *Kelly v. McCormick*, 28 id. 318; *People v. Groat*, 22 Hun, 164; *People ex rel. Atkinson v. Tompkins*, 64 N. Y. 53; *L., etc., Co. v. Littlewolf*, 38 Wis. 152; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 70; *San Antonio v. Mehaffy*, 96 U. S. Rep. 315.) A municipal corporation is estopped from availing itself of irregularities by its officers in the exercise of power conferred. (*Moore v. City of New York*, 73 N. Y. 238, 244, 246, 247, 250, 251; *Oneida Bank v. Ontario Bank*, 21 id. 490.) The town is liable under the bond, without a seal; and this, independent of the fact that the action of the commissioners is merely directory. (*Springport v. Teutonia Savings Bk.*, 75 N. Y. 397; *Draper v. Springport*, 104 U. S. 501; *San Antonio v. Mehaffy*, 96 id. 315; *United States v. Linn*, 15 Peters, 290; *United States v. Bradley*, 10 id. 364; *Board, etc., v. Fonda*, 77 N. Y. 350; *People v. Lyons*, 7 Daly, 182; *Ring v. Gibbs*, 26 Wend. 502; *Whitney v. Coleman*, 9 Daly, 238; *People v. Mead*, 24 N. Y. 114; 36 id. 224; *Starin v. Genoa*, 29 Barb. 442; *McGowen v. Deyo*, 8 id. 342; *United States v. Stephenson*, 1 McLean, 462; *Bancroft v. Stanton*, 7 Ala. 351; *Van Duzen v. Hayward*, 17 Wend. 67; *Curtis v. Leavitt*, 17 Barb. 318; *Kelley v. McCormick*, 28 N. Y. 318; *Lathrop v. Bramhall*, 64 id. 365; 26 Wend. 502; 9 Daly, 238; 15 Peters, 290, 307; 10 Wall, 365; 5 Mass. 318; 12 id. 369; 5 Allen, 415; 77 N. Y. 350; 10 Peters, 364; *Bernard's Township v. Stebbins*, 109 U. S. 341; 8 Barb. 342; 5 Wend. 191; 9 id. 223; 28 N. Y. 318, 321; 3 Comstock, 188; 18 Wend. 521; 20 id. 673; 7 Ala. 351; 17 Barb. 318; *Bullock v. Whipp*, 1 New Eng. Rep. 809; *Lebanon Savings Bk. v. Hollenbeck*, 29 Minn. 322.) The bonds were properly sealed by the commissioners. (*Curtis v. Leavitt*, 17 Barb. 309; 15 N. Y. 9; *Ross v. Beddell*, 5 Duer, 462; *Gillespie v. Brooks*, 2 Redf. 349; *Queen v. St. Paul*, 9 Jurist, 442; 7 Q. B. 232; *Underwood v. Dollins*, 47 Mo. 259; *N. O. R. R. Co. v. Burke*, 53 Miss. 200; 1 Dillon on Mun. Corp. § 190; *Meredith v. Hindale*, 2 Caines, 362; *Warner v. Lynch*, 5 Johns. 239; 2 Hill, 227; 4 Cow. 508; 3 Hill, 493; 1 Denio, 376; *Pierce v. Indseth*,

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106 U. S. 546.) It is sufficient that the seal, whatever it is, be impressed directly on the paper. (2 R. S. 404, § 61; Code, § 960; *Pillow v. Roberts*, 13 How. [U. S.] 474.) If a seal is necessary, and this is not a perfect seal, the declaration that it is sealed, and the sale for value with a place for a seal left open, and pointed out, is an authority to any person holding to place a seal in the blanks. (*Fullerton v. Sturges*, 4 Ohio St. 530; *Angel v. Ins. Co.*, 95 U. S. 339; *Montague v. Perkins*, 22 Eng. L. and Eq. 516; *Boyd v. Brotherson*, 10 Weld. 93; *Mitchell v. Culver*, 7 Cow. 337; *Ledwich v. McKim*, 53 N. Y. 307; *Hardy v. Norton*, 66 Barb. 534; *Michigan Bk. v. Eldred*, 9 Wall. 544; *Redlich v. Doll*, 54 N. Y. 234; *C. C. Banks v. Bradner*, 44 id. 680; *Paige v. Morrell*, 3 Keyes, 117; *Van Deusen v. Howe*, 21 N. Y. 531; *Day v. Saunders*, 3 Keyes, 347; *Clute v. Small*, 17 Wend. 238; *Garrard v. Hadden*, 67 Penn. 82.) The burden of proof rests with the plaintiff, when it asks the court to destroy this paper, to prove, first, that the act was done by a party in interest; and next that it was done with an evil intent. (*Trow v. G. C. S. Co.*, 1 Daly, 280; *Rees v. Overbough*, 6 Cow. 746; *Warrall v. Green*, 3 Wright, 388; *Van Brunt v. Eoff*, 35 Barb. 501; *Casoni v. Jerome*, 58 N. Y. 221; *Booth v. Powers*, 56 id. 31; *Merrick v. Bowery*, 4 Ohio St. 71; *Meyer v. Huneke*, 55 N. Y. 412; *Kennedy v. Kountz*, 63 Penn. 387; *Clute v. Small*, 17 Wend. 238; *Flint v. Craig*, 59 Barb. 319; *Truett v. Wainwright*, 9 Ill. 411; *United States v. Linn*, 1 How. 104; *Nevens v. Legrand*, 15 Mass. 436; *Horst v. Wagner*, 43 Iowa, 373.) The plaintiff is estopped by the recitals in the bonds from alleging (1) that the bonds were not delivered on the day they bear date, and (2) that they were not, when issued, sealed as they came to the hands of the purchaser. (*Moore v. City of New York*, 73 N. Y. 238; *Sheboygan v. Parker*, 3 Wall. 96; *Gould v. Town of Oneonta*, 71 N. Y. 304, 308; *Horn v. Town of New Lots*, 83 id. 106; *Cagwin v. Town of Hancock*, 84 id. 540; *Lyons v. Chamberlain*, 89 id. 578; *McNeil v. Tenth Nat., Bk.*, 46 id. 325; *Bk. of Batavia v. New York, etc., Co.*,

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106 id., 195; *Curnen v. Mayor*, etc., 79 id. 511; *R. R. Co. v. Schulte*, 103 U. S. 118; *Dair v. U. S.*, 16 Wall. 4; *Butler v. U. S.*, 21 id. 272; *Avery v. Town of Springport*, 14 Blatchf. 272.) The change of the denomination and place of payment of the Solon bonds by the commissioners was proper. (*Fleming v. Village*, 92 N. Y. 368; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id. 68; *F. & M. Bk. v. Butcher*, etc., 16 id. 142; *President v. Corwin*, 37 id. 330; *Lee v. Village of Sandy Hill*, 40 id. 442.) The town cannot repudiate the bonds because of its full and abundant recognition of their validity, and unreasonable delay in denying them. (*Zabriskie v. C.*, etc., *R. R. Co.*, 23 How. 401; *Alvord v. S. Sav. Bk.*, 98 N. Y. 609; *Town of Menth v. Cook*, 108 id. 510; *Hill v. P. Sav. Bk.*, 101 id. 490; *People v. Smith*, 55 id. 135; *In re B. W. & N. R. R. Co.*, 72 id. 245; 75 id. 335; *Farnham v. Benedict*, 107 id. 159; *Town of Lyons v. Chamberlain*, 89 id. 578; *Hoyt v. Thompson*, 19 id. 207; *Sheldon v. Eickmeyer*, etc., *Co.*, 90 id. 616; *F. L. & T. Co. v. Walworth*, 1 id. 433.) The fact that some of the Taylor consents bore evidence of erasure, so as to request the town to be bonded for \$20,000 rather than \$25,000, does not invalidate the bonds. (*Little v. Herndon*, 10 N. Y. 31; *Crossman v. Crossman*, 95 id. 145; *Syracuse Sav. Bk. v. Seneca Falls*, 86 id. 321; *People v. Allen*, 52 id. 541, 542; *Macon v. Shores*, 97 U. S. 277; *County of Jo Daviess v. Haydekoper*, 98 id. 98; *People v. Smith*, 49 N. Y. 777; *Orleans v. Platt*, 99 U. S. 676; *Lyons v. Munson*, 96 id. 684; *Cagwin v. Town of Hancock*, 84 N. Y. 582.) A certificate of stock is simply the evidence of the shareholder's title. (*Onondaga Trust Co. v. Price*, 87 N. Y. 549; *Pierce on Railroads*, 118, 119; *Potter on Corp.* §§ 257, 334, 335.) A court of equity will not entertain an action to set aside a bond for a defect which either appears upon the face of it, or must be proved, to recover at law. (*Town of Venice v. Woodruff*, 62 N. Y. 462, 464; *Fowler v. Palmer*, Id. 533; *Town of Springport v. Teutonia Sav. Bk.*, 75 id. 397; *Remington Paper Co. v. O'Dougherty*, 81 id. 482; *Globe Mut. Ins. Co. v. Reals*, 79 id. 202; *Thompson v.*

Opinion of the Court, per BRADLEY, J.

Hodskin, 13 Week. Dig. 367; *T. & B. R. R. Co. v. B., H. T. & W. R. R. Co.*, 86 N. Y. 107, 127; *Brenner v. Meigs*, 64 id. 515; *White v. Hulbert*, 46 id. 115; *People v. Hutton*, 18 Hun, 122; *People v. Spencer*, 55 N. Y. 6.)

BRADLEY, J. The relief sought in bringing this action was that certain bonds of the plaintiff, purporting to have been issued pursuant to statute, and held by the defendant, be adjudged void, and that they be surrendered up and canceled.

They, with other bonds amounting in the aggregate to \$44,800, were, by commissioners appointed for that purpose, in a proceeding had before the county judge of Cortland county, issued in aid of the Utica, Chenango and Cortland Railroad Company. The proceeding, which resulted in an adjudication and appointment of the commissioners, was had and completed in July, 1870. It was founded upon the statute, which provided that "whenever a majority of the taxpayers of any municipal corporation in this state, whose names appear upon the last preceding tax-list or assessment-roll of said corporation, as owning or representing a majority of the taxable property in the corporate limits of such corporation, shall make application to the county judge of the county in which such corporation is situated, by petition verified by one of the petitioners, setting forth that they are such a majority of taxpayers and represent such a majority of taxable property," etc., the further proceedings may be taken as therein provided, for the requisite adjudication and the appointment of commissioners to issue the bonds of the corporation and invest them in the stock or bonds of the railroad company, in view of which the proceeding was taken. (Laws of 1869, chap. 907.) The adjudication was in due form made, and the commissioners appointed were vested with power to issue the bonds of the plaintiff and invest them in the stock or bonds of the railroad company, if the proceeding was so taken and conducted as to confer jurisdiction on the county judge to entertain and consummate it.

Opinion of the Court, per BRADLEY, J.

The first inquiry which is the subject of controversy arises upon the petition presented to the county judge, and by which the proceedings before him were initiated. It was essential to his jurisdiction and to the validity of the adjudication and its result, that the petition contain a statement of all the facts which the statute provided should be set forth in the application. And, as the proceeding rests wholly upon the statute, and is in derogation of the common law, and affects the rights of property of individuals, the statute must be strictly pursued in all respects pertaining to the question of jurisdiction, to render the proceeding effectual. (*People ex rel. Rogers v. Spencer*, 55 N. Y. 1; *People ex rel. Green v. Smith*, Id. 135; *Town of Wellsborough v. N. Y. & C. R. R. Co.*, 76 id. 182; *Craig v. Town of Andes*, 93 id. 405.)

The petition was addressed to the county judge and proceeded to state that "The undersigned, representing a majority of the taxpayers of the town of Solon, in said county of Cortland, whose names appear upon the last preceding tax-list or assessment-roll of said town," etc. Nothing in the further provisions of the petition is criticised. It was signed by persons purporting then to be citizens of that town, and upon it was the verification by the affidavit of one of the petitioners, which, among other things, stated that "the persons signing said petition are a majority of the taxpayers whose names appear upon the last preceding tax-list and assessment-roll in said town."

The contention on the part of the plaintiff is, that the petition failed to set forth that the petitioners were such a majority of the taxpayers by reason of the insertion of the word "representing," which, it is claimed, so qualified the phrase "a majority of the taxpayers" following it, as to import that such majority did not themselves subscribe the petition, but did it only through the instrumentality of others who were such subscribers, and, in the relation of agency, represented such taxpayers in thus making the application. If the petition in that respect requires such construction, it was defective and could not support the proceedings founded upon it. (*People ex rel. Haines v. Smith*, 45 N. Y. 772.) The inser-

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tion of the word "representing" was clearly of no advantage to the petition, and if it had been omitted, there would have been no opportunity for criticism. But the word in its connection and apparent purpose, we think, is not entitled to the interpretation and effect contended for by the plaintiff's counsel, in giving construction to the instrument. It may be treated as having reference and relation to the term "majority" rather than to the persons constituting it. The inquiries, What represents a majority? How is a majority represented? in their application to it as a term, might produce as the answer: More than one-half of the whole of any number of persons or things. In that sense it would be within common parlance to say that a majority is represented by a particular body of people, although they are the persons who constitute the majority. That this was the meaning applicable and intended by the statute to be applied in the use there made of it, appears by the provision in the second section of the same act, that "if it shall appear satisfactorily to him (the county judge) that the said petitioners, or the said petitioners and such other taxpayers as may then and there appear before him and express a desire to join as petitioners in said petition, do *represent* a majority of the taxpayers," etc., and in the third section, that "if the said judge shall adjudge and determine that such petitioners do *represent* a majority of such taxpayers" etc. The same expression is carried into and repeated in the amendatory act. (Laws 1871, chap. 925, § 2.) The use made of the word in that connection by the statute would seem to be a legislative interpretation of it for the purposes of the act, and thus give to the phrase in question, of the petition, the requisite import, and make it correspond, in that respect, with the affidavit of verification and the adjudication as made by the county judge. The portion of the petition which embraced the names of the subscribers is not in the record, and, in view of the finding of the trial court, it must be assumed that no appearance of agency was there indicated. Apparently, as principals, and in the manner required by the statute, the petitioners, appear in the petition, as owning or representing a majority of the tax-

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able property in the town, and represent that they desire the creation and issue of its bonds, etc. It is very likely that the exercise of more care in preparing the petition would have been manifested if the criticised word had been omitted ; and the same may perhaps be said in respect to the like phrase in the statute. But when it can be ascertained, such meaning must be given to words as is apparently designed for them in their connection and use in statutes or other instruments, although it may not strictly conform to their lexical meaning. We think the construction was warranted that the petition set forth that its subscribers then were a majority of the taxpayers of the town, etc., as required by the statute. It follows that the county judge had jurisdiction to entertain the proceeding ; and it sufficiently appears by his statement in the notice for publication, signed by the county judge, to warrant the conclusion that the requisite order was made by him for that purpose. There is no remaining question going to the jurisdiction of that officer to make the adjudication and appoint the commissioners, which was duly accomplished by him.

In respect to their duties, the statute provided that it should be the duty of the commissioners to cause to be made and executed the bonds of the municipal corporation, attested by the seal of such corporation affixed, if it have a common seal, and if not, then by their individual seals and signed and certified by them. The commissioners made and issued the bonds of the town to the amount before mentioned, and invested them in the stock of the railroad company for a like amount. The town had no common seal. The attestation clause of each bond was : " In witness whereof the within named commissioners * * * have caused this bond to be made and executed, and have set their hands and seals hereto the first day of September, in the year one thousand eight hundred and seventy ; " and they subscribed their names as commissioners, and opposite each was the scroll "[L. s.]." The requisite of a seal at common law was that it be impressed upon wax, wafer or other tenacious substance. It is contended by the defendant's counsel that

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This doctrine has been relaxed, and that the scroll upon bonds may be treated as adopted by the commissioners by their seal, and, therefore, rendered effectual as such. Whatever may have been the practice in other states, the rule of the common law in that respect has been substantially adhered to in this state, except so far as modified by statute. (*Warren v. Lynch*, 5 Johns. 239; *Bank of Rochester v. Gray*, 2 Hill, 227; *Farmers and Manufacturers' Bank v. Haight*, 3 Hill, 493; *Coit v. Milliken*, 1 Denio, 376.) The statute on the subject has relation only to corporate and official seals. In the cited case of *Curtis v. Leavitt* (15 N. Y. 9), the question of the sufficiency of the seal to the bonds in question, which were made prior to such statute, was considered in some of the several opinions delivered. They were the bonds of a corporation, and the corporate seal was merely impressed upon the paper on which each bond was written or printed. The view of Judge Comstock was that the rule in England on that subject was applicable as the contract was made there, and cited *Queen v. Inhabitants of St. Paul, etc.* (7 Adol. & Ellis [N. S.] 232), in support of the proposition that an impression on wax or wafer was unnecessary, but that it was sufficient that the seal be impressed upon the paper with intent to seal. It is unnecessary to refer to the view of other members of the court, as no question as to the seal was determined by the court in that case, other than that no seal was necessary to the validity of the bonds. In *Ross v. Bedell* (5 Duer, 462), the question arose upon a notarial seal, and it was held that a seal stamped upon paper of sufficient tenacity to retain the impression is a seal within the rule of the common law. (*Van Bokkelen v. Taylor*, 62 N. Y. 105.) The doctrine established in this state upon the subject, does not permit the conclusion that the scroll upon the bonds in question was the seal of the commissioners.

But it does not follow that the bonds are for that reason invalid. There are no negative words in the statute declaring or necessarily implying such effect of the omission of the seal, and whether or not this requirement was merely directory, as

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held in *Draper v. Springport* (104 U. S. 501), inasmuch as they were issued and delivered by the commissioners in the performance of their duty and upon a consideration, the mistake or failure to affix their seals does not defeat the enforceable validity of the bonds. (*People ex rel. Fiedler v. Mead*, 24 N. Y. 114; *Kelly v. McCormick*, 28 id. 318; *Board of Education v. Fonda*, 77 id. 350; *San Antonio v. Mehaffy*, 96 U. S. 312; *United States v. Linn*, 15 Peters, 290.)

At all events, as the commissioners intended to properly and effectually execute the bonds, and the omission of the seals was caused by their misunderstanding, mistake or inadvertence, the court of equity may afford the relief requisite to the party justly entitled to the benefit of the instruments, and to render them enforceable. (*Wiser v. Blachly*, 1 Johns. Ch. 607; *Bernards Township v. Stebbins*, 109 U. S. 341; *Cockerell v. Cholmeley*, 1 Russ. & Myl. 418.)

In September, 1875, the defendant, by purchase, for a valuable consideration, became the owner and holder of thirty-two of the bonds of five hundred dollars each. At that time seals had been affixed and were upon them over the places where the scroll before mentioned was placed, so that the bonds then appeared to have been properly sealed. The defendant purchased them in good faith, and then supposed that the seals were those of the commissioners. The evidence tends to prove that the seals were not affixed by any officer of the railroad company who received them from the commissioners, and that they were not upon them when transferred by the company. Who were all the intermediate holders, between the transfer by the railroad company and the purchase of them by the defendant, does not appear. The trial court found that those seals were affixed by a stranger. If placed there by some one having no interest in the bonds, and without any authority, consent or complicity of any person having any interest, the seals would not be treated as affecting any alteration of the bonds. (*United States v. Linn*, 1 How. [U. S.] 104; *Rees v. Overbaugh*, 6 Cow. 746; *Casoni v. Jerome*, 58 N. Y. 315; *Fullerton v. Sturges*, 4 Ohio St. 530.)

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If, therefore, this was done by a stranger in the sense of the term applicable in such case, the alteration produced by it would not be effectual to impair the right before existing to enforce the bonds. But, inasmuch as they passed through the hands of other owners before they reached the defendant, it is contended that the finding that it was done by a stranger is not supported, and that the presumption arises that the seals were affixed by some party having an interest in having them put on, and, therefore, explanation is necessary to relieve them from the legal effect of the alteration. As a general rule, when a material alteration appears to have been made in a written instrument after its execution, evidence is necessary to explain it, and the burden of proof rests upon the party seeking to enforce it to do so to support a recovery upon it. (*Herrick v. Malin*, 22 Wend. 388; *Smith v. McGowan*, 3 Barb. 404; *Simpson v. Davis*, 119 Mass. 269; *Willett v. Shepard*, 31 Mich. 106; *Waring v. Smyth*, 2 Barb. Ch. 119.)

The plaintiff's counsel seeks to apply that rule in respect to the burden of proof to this case, and insists that the defendant must bear it. While the burden is with a party seeking to enforce a contract, to relieve it from the effect of any material alteration made in it after its inception, that rule is not necessarily applicable to a defendant in an action brought to have a security held by him canceled upon that ground, when it appears that such defendant is in no sense chargeable with *mala fides* in that respect. Our attention is called to no authority going to that extent. And the proposition does not seem to commend itself to a court of equity, which is supposed, within recognized bounds, to exercise discretionary powers in such cases. (*McHenry v. Hazard*, 45 N. Y. 580; *Town of Springport v. Teutonia Sav. Bk.*, 75 id. 397-408.) It does not appear that the bonds were necessarily invalidated by the addition of the seals, treating it as a material alteration. And as against the defendant, who is a holder in good faith and free from imputation in the matter, the presumption which might arise in an action where the securities were asserted for the purpose of a recovery founded upon them, is not properly

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available in this action, brought for the purpose of their cancellation. Equity will not grant such relief upon a doubtful case. For the purpose of the relief in view in the action, it cannot be assumed upon the case, as presented, that the alteration was fraudulently made. And if the defendant eventually fail to recover upon the bonds, it may be that a recovery can be supported upon the original consideration. (*Clute v. Small*, 17 Wend. 238; *Meyer v. Huneke*, 55 N. Y. 412-417.) It is not now necessary to inquire into the extent or value of such a remedy.

The alleged alteration upon the facts appearing in the record does not, in this action, entitle the plaintiff to the relief in view against the defendant.

It is urged on the part of the defendant that, in view of the reference in the attestation clause to seals as affixed, with the fact that the scroll before mentioned was added, afforded an invitation or implied authority to any holder to affix the requisite seals. And cases are cited bearing upon that subject in relation to uncompleted instruments. But the cases generally, in which that has been recognized and supported, have been those where the possession of the uncompleted paper has been intrusted to persons under circumstances which permitted the inference of authority to do it, and when, in view of such apparent authority it would be a fraud upon innocent parties taking in good faith to permit the assertion to the contrary. (*Ledwich v. McKim*, 53 N. Y. 307; *Chemung Canal Bk. v. Bradner*, 44 id. 680; *Redlich v. Doll*, 54 id. 234; *Van Duzer v. Howe*, 21 id. 531; *Day v. Saunders*, 3 Keyes, 347; *Mitchell v. Culver*, 7 Cow. 336; *Boyd v. Brotherson*, 10 Wend. 93; *Michigan Bk. v. Eldred*, 9 Wall. 544; *Angle v. N. W. Mut. Life Ins. Co.*, 92 U. S. 330.) The bonds in question were not treated by the parties to them as incomplete, but when issued by the commissioners were supposed by them to be completely executed and were delivered and accepted as such. Nothing, therefore, appears to have then occurred between the parties to imply authority to add anything to the instruments to give them a different import in any respect

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than that which they then had. While we do not hold that there was any implied authority of any holder to affix the seals, the views already given render it unnecessary to express any opinion upon the question. The fact that the commissioners, in the attestation clause, declared that they had affixed their seals to the bonds was well calculated to deceive the defendant when it purchased them and to enable its officer to understand that they had been properly placed there, but we are not, for the purposes of this action, called upon to determine whether, as against the plaintiff, any advantage can on that account legally result to the defendant.

It is contended that the bonds held by the defendant were issued without authority and were, for that reason, void. This contention is founded upon the fact that about three months after the last of the bonds were delivered by the commissioners to the president of the railroad company, he surrendered up to them a number of those bonds, amounting to \$24,000, and they issued and delivered to him, in their place, a like amount, of which those held by the defendant are a part. The substituted bonds were of larger denomination than those so surrendered, and were made payable at a different place. And this change was made with a view to their availability for sale and transfer in the city of New York. It may be assumed that the power of the commissioners to issue bonds of the town ceased when they had issued the amount mentioned in the petition of the taxpayers. The returned bonds had not been used by the railroad company. They were destroyed by the commissioners, so the substituted bonds did not increase the entire amount outstanding beyond the authorized limit. The bonds issued pursuant to the statute were the obligations of the town, and, in the performance of their defined duty in that respect, the commissioners represented the plaintiff, and, in some sense, their relation was that of agency. When the proceeding for the purpose has been (as is treated to have been in this case), legally conducted to the appointment of such officers, irregularities in the manner in which they perform

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their duties do not affect the validity of the bonds issued in the hands of an innocent holder for value. (*Town of Lyons v. Chamberlain*, 89 N. Y. 586.) The bonds are in form negotiable, and while they cannot be treated as commercial paper, to the extent of the rule applicable to it in that respect, they have the character of negotiability sufficiently to furnish, under some circumstances, protection to a *bona fide* holder, which he otherwise would not have for the support of his claim upon them. (*Bank of Rome v. Village of Rome*, 19 N. Y. 20; *Brainard v. N. Y. C. R. R. Co.*, 25 id. 499.)

The liability of the municipal corporation is dependent upon the statute, and its observance in the proceedings had with a view to the creation of such obligations. And when there is a failure to comply with the statute in the steps taken to vest the power in those officers to create the bonds, there can in this state be taken no rights by a person as a *bona fide* holder. (*Cagwin v. Town of Hancock*, 84 N. Y. 532; *Craig v. Town of Andes*, 93 id. 405.)

So far as we have observed, the doctrine of the cases does not necessarily go any further in that respect. The examination of the proceedings before the county judge disclosed their regularity and showed that the persons whose names were subscribed to the bonds, were duly appointed, and by the statute vested with the power to issue bonds like those in question. While the commissioners were not appointed by the town or clothed with power by it, the power to exercise their statutory defined duties was given pursuant to the requisite consent of the taxpayers. The question, therefore, arises whether, by this issue of the substituted bonds, the plaintiff was charged with liability. The issue of bonds outstanding in excess of the amount authorized would have been void. That was not the case here, and the plaintiff was practically unaffected by those put in place of the ones surrendered. The plaintiff, through the commissioners, paid the interest coupons upon them for several years, and the defendant was the holder of them for six years before this action was commenced. These facts might be entitled to some con-

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sideration upon the question of laches. (*Alvord v. Syracuse Sav. Bk.*, 98 N. Y. 599, 610.) But we do not place our conclusion upon that ground. The defendant was a *bona fide* holder of these bonds, and as such relied upon the authority with which the commissioners were lawfully clothed. To charge the plaintiff upon them would not increase its apparent liability beyond that which it undertook by the proceeding had pursuant to the statute to assume. So there is no equity in its behalf as against the defendant, to support this action for their cancellation arising out of the substitution. The defendant was, not only by the apparent situation at the time of the purchase, but by the continued recognition of the obligation of the bonds for several years thereafter, induced to understand that they were in all respects lawfully created. And they were, in fact, issued and delivered by the persons clothed with power to issue the bonds of the town. The extrinsic fact now relied upon to deny to them the power to issue these particular bonds at the time and in the manner it was done, was peculiarly within the knowledge of those persons so selected to represent the town in that respect. This, as between principal and agent, is sufficient to charge the former with the consequences of the act of the latter in the scope of his apparent authority, as against an innocent party acting in reliance upon such situation, although authority to do the particular act does not, in fact, exist. (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, 106 id. 195.) This proposition may not, to the full extent to which it is applied to the relation of an agent clothed by his principal with authority, be applicable to the commissioners in their relation to the town for which they are appointed to perform the duties devolved upon them, but in the reason of it is illustrated a principle which may be applied to the circumstances of the present case in reference to the execution of the bonds in question.

In the cited case of *Horton v. Town of Thompson* (71 N. Y. 513), the bonds appeared to have been, in terms, issued

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in violation of the statute pursuant to which the consent of the taxpaycrys was given, upon which the proceeding taken was had. And the remarks of the learned judge who delivered the opinion may be treated as applicable only to the case as there presented. They represent the town in the exercise of the powers with which they are vested. (*Cagwin v. Town of Hancock*, 84 N. Y. 542; *Alvord v. Syracuse Savings Bank*, 98 id. 599.)

The practical effect of this substitution of the bonds was not an excessive issue, but the continuance of those issued, modified in form, not in substance, and these were the only ones, with others outstanding, which covered the amount of the stock of the railroad company, to which the commissioners had subscribed for the town, and for which they had undertaken to issue its bonds for a like amount. "He that seeks equity must do equity," is a fundamental maxim of equity jurisprudence.

The conclusion is that the plaintiff was not entitled to the relief sought in this action upon the facts as proved and found in the court below.

The judgment should be affirmed.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

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GEORGE T. NEWHALL, Respondent, v. WILLIAM H. APPLETON et al., Appellants.

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Usage in relation to matters embraced in a contract when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, and not in contradiction of the express terms of the contract, and when it is so far established and known to the parties that it may be supposed the contract was made in reference thereto, is deemed to form part of it; and evidence is always admissible to explain the meaning usage has given to words or terms as used in a particular trade or business to enable the court to declare what the contract expressed to the parties.

Defendants employed plaintiff to obtain subscriptions for an encyclopedia and other publications issued in numbers, agreeing to pay him "fifteen dollars an order for each and every order" obtained for the encyclopedia

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and four dollars an order for the other publications. In an action upon the contract defendants offered to prove that in the subscription book business the words used had a definite and well established meaning; that the words "fifteen dollars an order for each and every order for the encyclopedia" were well understood to mean every order under which five volumes have been taken and paid for by the subscriber and that four dollars an order for the other publications meant an order upon which ten parts or numbers of the publication had been taken and paid for. This was objected to and excluded. *Held*, error.

Reported on a former appeal, 102 N. Y. 138.

Newhall v. Appleton (102 N. Y. 138), distinguished.

(Argued March 20, 1889; decided April 16, 1889)

APPEAL from judgment of the General Term of the Superior Court of the city and county of New York, entered upon an order made February 8, 1887, which affirmed a judgment in favor of the plaintiff, entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

William W. Badger for respondent. The defendants having pleaded express contract only, and not alleging any custom or trade meaning to affect it in any way, were properly not allowed to ask their own witnesses if the term, "so much an order," or "four dollars for every order," has a settled meaning in the business in connection with the payment of a canvasser for serials, and if so, "what meaning has it?" (*Newhall v. Appleton*, 102 N. Y. 133, 134; *Bigelow v. Legg*, *id.* 653, 654; *Holmes v. Pettingill*, 1 Hun, 316; 60 N. Y. 646; *Silberman v. Clark*, 96 *id.* 524; *Security Bk. v. Bk. of Republic*, 67 *id.* 460, 463; *Herman v. Niagara Ins. Co.*, 100 *id.* 416; *Hinton v. Locke*, 5 Hill, 21; *Mutual Safety Ins. Co. v. Home*, 2 N. Y. 244; *Hill v. H. Ins. Co.*, 10 Hun, 29; *Main v. Eagle*, 1 E. D. Smith, 619; *Vail v. Rice*, 5 N. Y. 157, 159.) Usage, to be admissible or competent to affect a contract, must be reasonable and not inconsistent with the terms of the contract, oral or written. (*Collender v. Dinsmore*, 55 N. Y. 200; *Lawrence v. Maxwell*, 53 *id.* 21; *Hinton v. Locke*, 5 Hill, 437; *Lawson on Usages and Customs*, 369,

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435; *Westcott v. Thompson*, 18 N. Y. 367; 2 Parsons on Contracts, 542, 547; *Bradley v. Wheeler*, 44 N. Y. 503; *Higgins v. Moore*, 34 id. 422; *Silberman v. Clark*, 96 id. 524; *Simmons v. Law*, 3 Keyes, 219.) If it be left in doubt whether given words of a contract were used in an enlarged or restricted sense, that construction should be adopted which is most beneficial to the promisee. (*Hoffman v. Aetna Ins. Co.*, 32 N. Y. 413; Coke on Litt. 183; *Johnson v. Hathorn*, 2 Abb. Ct. of App. Dec. 465, 468; *Mowatt v. Londsboro*, 3 E. & B. 307; *Gifford v. Church*, 56 Barb. 114; *Marvin v. Stone*, 2 Cow. 806; *Hinton v. Locke*, 5 Hill, 437; *Goodyear v. Ogden*, 4 id. 105; *Dawson v. Kittle*, 4 id. 107, 109; *White v. Hoyt*, 73 N. Y. 511; *Dickinson v. Poughkeepsie*, 75 id. 67, 77; *Simmons v. Law*, 3 Keyes, 219; *Clark v. Baker*, 11 Metc. 186; *Harris v. Tumbridge*, 83 N. Y. 100; *Miller v. Burke*, 68 id. 615; Lawson on Usages and Customs, 40; *Barnard v. Kellogg*, 10 Wall. 383; 49 N. Y. 475.) It is clearly incompetent to allow a party to prove his own declarations or acts or customs while performing an agreement, for the purpose of characterizing the agreement itself. (*Newhall v. Appleton*, 102 N. Y. 133; *Reed v. U. S. Express Co.*, 48 id. 468; *Whitewhouse v. Bk. of Cooperstown*, id. 239; *Moore v. Meacham*, 10 id. 207; *Peck v. Von Keller*, 76 id. 604; *S. C.*, 15 Hun, 470; *Gilchrist v. Grocers*, 59 N. Y. 495, 499.) Even if payment depended on the deliveries exactly as defendants claimed, then defendants assumed the duty of delivery promptly. (*Eddy v. Stanton*, 21 Wend. 255, 258.) The burden of proof was on defendants to show the conditions as to payments which they pleaded. (*Hollister v. Bender*, 1 Hill, 150, 153; *Johnson v. Plowman*, 49 Barb. 472; *Green v. Waggoner*, 2 Hilton, 297; *Holbrook v. Wilson*, 4 Bosw. 64; *Simpson v. Hart*, 14 Johns. 74; *Wakeman v. Grover*, 4 Paige, 23; affirmed, 11 Wend. 187.)

Edward Winslow Paige for appellants. It was error to reject the evidence offered by the defendants to show the meaning, in the subscription book business, of the words "four

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dollars an order," and "four dollars a name." (1 Greenl. Ev. §§ 288, 292; *Hinton v. Locke*, 5 Hill, 21.)

PARKER, J. This action was brought to recover upon a contract for obtaining subscriptions to certain publications known as the "American Encyclopedia," "Picturesque Europe," and "Turner's Gallery." The complaint contained averment of a contract by defendants to pay the plaintiff "fifteen dollars for each and every order he obtained for said encyclopedia, and four dollars for each and every order he obtained for said other publications." The answer admitted a contract to pay the plaintiff those sums upon the orders, under which five volumes of the encyclopedia and ten parts of each of the other publications, respectively, had been taken and paid for by the subscriber, and not otherwise, and further alleged payment of the amount due under the contract.

Upon the trial the plaintiff gave evidence that an oral contract, as averred in the complaint, had been made between him and defendants.

The defendants thereupon offered evidence to show that in the subscription book business the words used in the contract had a definite and well-established meaning, and that meaning was as set forth in the answer. That the words "fifteen dollars an order for each and every order obtained for the encyclopedia" meant, and were well understood in the subscription book business to mean, \$15 an order for each and every order obtained for the encyclopedia, under which five volumes have been taken and paid for by the subscriber, and not otherwise. While \$4 an order for the other publications meant, \$4 for an order under which ten parts each, respectively, had been taken and paid for by the subscriber and not otherwise, the learned referee refused to receive the evidence, and thus rendered it impossible for the defendants to successfully present the only issue tendered by their answer. We think this was error.

"Every legal contract is to be interpreted in accordance with the intention of the parties making it. And usage, when it is reasonable, uniform, well settled, not in opposition to fixed

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rules of law, not in contradiction of the express terms of the contract, is deemed to form a part of the contract and to enter into the intention of the parties, when it is so far established and so far known to the parties that it must be supposed that their contract was made in reference to it." (*Walls v. Bailey*, 49 N. Y. 464-469; Starkie on Ev. 637, 710; 1 Greenl. on Ev. §§ 292-294; Broome Leg. Max. 682, 889, 890; 2 Parsons on Cont. 541.) And evidence is always admissible to explain the meaning which usage has given to words or terms as used in any particular trade or business, as a means of enabling the court to declare what the language of the contract did actually express to the parties. (Wharton on Ev. § 962; *Dana v. Fiedler*, 12 N. Y. 40; *Hinton v. Locke*, 5 Hill, 437.) The principle stated in the authorities cited authorized the introduction of evidence, on the part of the defendants, tending to show that by the usage or custom of the subscription book business, the words used in the contract had a well-defined meaning, which was understood by both parties to the contract, and what such meaning was. The evidence of custom was admissible, not to change or vary the contract made, but to ascertain with greater certainty what was the intention of the parties at the time of its making.

The question now decided was not directly passed upon by this court on the former appeal. (102 N. Y. 133.)

The evidence erroneously rejected on the trial now under review was admitted on the first trial, and the defendants succeeded upon the issue. The plaintiff appealed and a reversal was had, not upon the issue as presented and passed upon, but because the trial court improperly admitted the books of the defendants for the purpose of showing their transactions with other agents.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

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JOHN POWERS, Respondent, *v.* THE CITY OF YONKERS,
Impleaded, etc., Appellant.

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Defendant V. entered into a contract with the city of Y. for improving one of its streets; the contract made it the duty of the city engineer to report to the common council in case the contractor should refuse or neglect to supply a sufficiency of skilled workmen or proper materials, or should fail in any respect to prosecute the work with promptness and diligence, or omit to fulfill any provision of the contract, and the common council were authorized, if satisfied of the correctness of such a report, to declare the contract forfeited, to employ other persons to finish the work "according to the plans and specifications," and to deduct the expenses from any sum due the contractor. While the contractor was engaged in performance the engineer reported that the time for the completion of the contract had "long since expired" and that the contractor had neglected to perform it in other respects. Pursuant to resolution of the common council notice was given the contractor that unless the work was prosecuted with diligence and promptness the city would consider the contract violated and forfeited, and that other persons would be employed to finish the work and the expense charged against the contractor; and, thereafter, that body adopted a resolution that the contract was broken and forfeited and the work was completed by the city. Some of the work done by the contractor, which was imperfect, was taken down and rebuilt. No notice had been given by the city to the contractor to take down and rebuild or otherwise change any of the work he had done. In an action to foreclose a mechanic's lien upon the moneys unpaid the city claimed to set-off the amount expended in completing the contract. The trial court excluded evidence of the cost of taking down and rebuilding the imperfect work, holding that the city having declared the contract forfeited on one ground could not thereafter allege other grounds, and that it was not authorized to take down and rebuild any work until the engineer had made a report that the contractor had neglected or refused to take down and properly replace such work. *Held*, error; that the forfeiture contemplated by the contract applied only to the contractor; and that upon forfeiture the city had the right to go on and complete the contract, not simply remedying the defects pointed out in the report, but in all other respects wherein the work was not completed according to the terms of the contract; that it was not requisite to specify in the resolution all the grounds of forfeiture, but it was sufficient to specify one tenable ground.

Several other lienors who were made defendants, and the amount of whose respective liens was less than \$500, claimed that as against them no appeal to this court could be taken from the judgment. *Held*, that the

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"amount in controversy," within the meaning of the provision of the Code of Civil Procedure limiting appeals to this court (§ 191, sub. 8), was the amount due the contractor; and, as this exceeded \$500, that the judgment was appealable.

(Argued March 29, 1889; decided April 16, 1889.)

APPEAL by the defendant, the city of Yonkers, from a judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 10, 1887, which affirmed a judgment in favor of plaintiff entered upon decision of the court on trial at Special Term.

On the 18th of August, 1883, the defendant George B. Valentine entered into a contract with the city of Yonkers, a municipal corporation, for grading, curbing and otherwise improving Walnut street in that city, according to certain plans and specifications. Said Valentine agreed to finish the work within one hundred days from August 28, 1883, and upon its completion the city agreed to pay him the sum of \$10,550, less ten per cent thereof, which was not payable until six months after the work was finished and duly accepted. It was provided, however, that the Common Council might, at its option, cause payments to be made, as the work progressed, to an amount not exceeding eighty per cent of "the full value of the work done," but that the exercise of such option should not be deemed to be inconsistent with any of the terms of the instrument," or "in any manner change their force and effect."

It was further provided that it should be the duty of the city engineer to report to the Common Council whenever the contractor should refuse, or neglect to supply a sufficiency of workmen of proper skill, and materials of proper quality, or should fail in any respect to prosecute the work with faithfulness, promptness and diligence, or should omit to fulfill any provision of the contract; that if the Common Council should be satisfied that such report was correct, it should have power to declare the contract "to be voided and forfeited, broken and violated" by the contractor, and the right to employ other persons to finish the work according to the plans and specifications; to charge the expenses thereof to him and to deduct the

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amount out of any moneys otherwise payable to him. Valentine commenced to perform the contract about August 24, 1883, but before the limit of one hundred days had expired he was directed by the city engineer who, according to the contract, had charge of the work for the city, to suspend until certain obstacles, for which the contractor was not responsible, had been removed.

On the 14th of September, 1885, while the contractor was engaged in performing his part of the agreement, the engineer in charge reported to the common council that the time provided for the completion of the contract had long since expired, and that the contractor had neglected to perform it in certain respects. Upon the same day the common council, by resolution, directed that notice be given to the contractor and his sureties that unless they should resume the work required by the contract and prosecute the same with diligence and promptness, the city, pursuant to the provisions of the contract, would consider it "violated, broken, voided and forfeited," and would employ other persons to finish the work required by the contract, and that the expense thereof would be charged against the contractor and deducted from the contract-price. Notice was given to the contractor accordingly, and on the 28th day of September, 1885, the common council adopted a resolution which, after reciting certain facts, declared that said contract was broken, violated and forfeited by the contractor, and directed the committee on streets to procure the necessary materials and the street commissioner to furnish the labor required by the contract so as to fully execute and perform the same in every respect, and that they should keep an accurate account thereof and report the same to the common council so that it might be charged against the contractor. Thereupon the work was completed by the city and some of the work done by the contractor was taken down and rebuilt. No notice was given to him by the city to take down or rebuild or otherwise change any of the work that he had done.

While the contractor was engaged upon the contract he was

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paid by the common council, upon various certificates of the engineer, the sum of \$8,186 in all, but, according to one of the stipulations, no certificate given or payment made under the contract was to be held to be an admission by the city that any part of the contract had been complied with, or that any detail of the work had been properly performed, in case the fact should be otherwise.

The plaintiff and some of the defendants, as sub-contractors under Valentine, or as laborers and material men, acquired liens upon the moneys due and to grow due from the city under said contract, pursuant to chapter 315 of the Laws of 1878. This action was brought by the plaintiff to foreclose his lien, and all of the other lienors were made parties as required by section 7 of said act.

The city, by its answer, after setting forth the facts, alleged that it expended in the completion of the contract the sum of \$1,828.40, and that the balance due the contractor, after deducting this sum, was \$215.60. which it was willing to pay into court.

The trial court held that the city, after declaring the contract forfeited upon one ground, could not afterwards be permitted to allege other grounds, and that it was not authorized to take down any work of the contractor and do it over at his expense until the engineer had made a report that the contractor had neglected or refused to take down such work and properly replace it. A decree, based upon appropriate findings, was entered adjudging that there was due from the city to the contractor the sum of \$2,454.94, and directing that it be distributed among the different lienors according to amount and priority, and that the remainder should be paid over to him.

Further facts are stated in the opinion.

Joseph F. Daly for appellant. This is the fund and only out of the fund provided by the contract can these liens here sought to be foreclosed be paid. (Laws of 1878, chap. 315, § 5.) In this action no recovery can be had unless it appears

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that there is money in the city treasury that was received from assessment or the sale of assessment bonds. (*Richardson v. City of Brooklyn*, 34 Barb. 569; *Hunt v. City of Utica*, 18 N. Y. 442, 445; *Baldwin v. City of Oswego*, 1 Abb. Ct. of App. 62; *Baker v. City of Utica*, 19 N. Y. 326, 327; *Tone v. Mayor, etc.*, 70 id. 157; *Swift v. Mayor, etc.*, 83 id. 528; Laws 1878, chap. 315, § 8.) If the city officers have been negligent, they can sue the city for that negligence, and in case they do this they can recover. But their action is in tort, not on contract. (*Reilly v. City of Albany*, 21 N. Y. State Rep. 460.)

Ralph E. Prime for respondent. The way in which any breach may be ascertained and determined provided by the agreement, is the only way, and that way must be used, and all other ways are excluded, and the maxim "*expressio unius est expressio alterius*" applies. (*Morey v. F. L. & T. Co.*, 14 N. Y. 306; *Curtiss v. Learritt*, 15 id. 259; *Still v. Coming*, Id. 300; *People v. Draper*, Id. 568; *Matter v. Bonaffe*, 23 id. 177; *People v. N. Y. C. R. R. Co.*, 24 id. 495; *Robbins v. Fuller*, Id. 577; *People v. Dolan*, 36 id. 65; *Fellows v. Heermans*, 13 Abb. [N. S.] 7.) This action is to foreclose a mechanic's lien and is not an action "affecting the title to real estate or an interest therein," and when a judgment in such a case is for less than \$500 there is no appeal to the Court of Appeals. (*Wheeler v. Schofield*, 67 N. Y. 311.)

VANN, J. On the 14th of September, 1885, the city engineer reported to the common council that the time to complete the contract had expired long before, and "also that the contractor has neglected to provide a sufficiency of workmen and material and failed to supply the same with such due diligence that the comparatively small amount of work remaining to be done thirty days ago has not been promptly prosecuted to completion, nor will it be finished this fall at the present rate of progress." Two weeks later, after due notice to the contractor of its intention to forfeit the contract if he did not prosecute

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the work with diligence and promptness, the common council decided that the work required by the contract had not been completed, and that it was not being prosecuted with promptness and diligence, and declared the contract forfeited. The parties agreed that the common council should have this power if it was "satisfied" that the report of the engineer was correct. The common council could not be arbitrary or capricious in the exercise of the power, but was bound to act judicially and declare that it was satisfied only when in reason and good conscience it might be satisfied. While it was not bound to be right, it was bound to act in good faith. This, in the absence of evidence to the contrary, it is presumed to have done. The facts furnished sufficient ground for its action. Just two years had elapsed since the contractor began his undertaking under the agreement to complete it in one hundred days. According to the undisputed evidence all of the delays for which the city was responsible, or that were owing to the season of the year or the weather, did not exceed one year. The report itself gave the common council jurisdiction and was sufficient evidence for it to act upon. It stated as facts the expiration of the contract time and the negligence of the contractor to provide a sufficiency of workmen and materials. Even after notice the contractor had two weeks, but, according to the recitals in the resolution of forfeiture, he did not, during that period, proceed with promptness and diligence to prosecute the work. The trial court assumed that the forfeiture was authorized, but held, in effect, that all defects not mentioned in the report of the engineer were waived by the city.

Assuming that the common council had jurisdiction to declare the contract forfeited, the question arises, what effect that action had upon the rights of the parties. It is claimed by the respondents that the city had the power only to finish the work not then done, or attempted to be done, either imperfectly or otherwise, while the appellant contends that it had the right to finish all work then incomplete, including that which the contractor had attempted to do, but had done poorly.

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The forfeiture contemplated by the contract applies only to the contractor by depriving him of the right to finish the work. It leaves the contract in force as to the city, but calls into operation new provisions especially adapted to the emergency. Those provisions do not simply authorize the common council to remedy the defects pointed out in the report, or to complete the work in those respects which the report mentioned as incomplete. They authorize the common council "to perform and furnish the work and material required by the plans and specifications, so as to fully execute and complete said work." Thus the power to complete the contract is unlimited. It is not confined to the ground upon which the contract may have been declared forfeited. The words "fully execute and complete" do not apply exclusively to that portion of the work which the contractor did not try to do at all, but they apply to all work not completed according to the plans and specifications. Instead of referring simply to that part of the street which had not been paved at all, they refer to the entire street and authorize everything to be done that was necessary to fully execute and complete the entire work as required by the contract. As the city had neither accepted any part of the work, nor waived any of the provisions of the contract, it was empowered to render perfect anything that the contractor had left imperfect, and to deduct the expense from the contract-price yet unpaid. It was not the intention of the parties, according to their written agreement, that upon declaring a forfeiture, the city should simply resume work where the contractor left off and finish it from that point only, with no right to remedy defects or to repair bad work in those parts of the street already gone over. Such a construction would deprive the words used by the parties of their natural meaning. If the contractor used poor materials and did poor work and finally refused to go on with the contract, the common council was not bound to declare the forfeiture upon all possible grounds. It was sufficient if it named a single tenable ground. That deprived the contractor of the right of further performance and con-

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ferred it upon the common council. It thereupon became the duty of that body to cause to be done that which the contractor ought to have done, in order to fully execute and complete the work in the form required by the plans and specifications. Jurisdiction to forfeit the contract upon any ground conferred the power to complete the contract in every respect. The forfeiture does not operate simply to the extent named in the report, but absolutely, and the right to correct defects extends beyond those reported by the engineer, to the entire work. The contract does not require that notice should be given to the contractor to replace poor material or change poor work. It provides that all materials used and work done shall be subject to inspection by the common council and engineer, and that if, in the opinion of either, the material or work is bad, it shall be remedied by the contractor. It also provides that such inspection shall not be construed to relieve the contractor from any obligation to execute the work in strict accordance with the true intent and meaning of the plans and specifications. These provisions, however, ceased to be operative after the forfeiture. They applied only while the contractor was still engaged in performing the contract.

We think, therefore, that the trial court erred in rejecting certain evidence offered to show what portions of the work were defectively done, according to the plans and specifications, and what the work done by the city to remedy the defects was worth. The ruling was apparently based on the theory that the city, by its action, had waived all imperfect work and should be confined to that which had not even been commenced. From what has already been said, it is clear that this evidence should have been received, and that the reasonable value of the work necessarily done under the direction of the common council to fully complete the contract according to the plans and specifications, should have been deducted from the contract price.

It is insisted by certain of the respondents that as the amount of their respective liens is less than \$500, no appeal can be

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taken from the judgment as to them. The matter in controversy, however, is the amount due the contractor from the city, as that must be established before any lien upon it can be enforced. The lien operates upon the moneys in the control of the city, due or to grow due under the contract. By the judgment appealed from, it is first adjudged that the sum of \$2,454.94 is due from the city to the contractor, under the contract, and then \$1,803.01 thereof is distributed among seven persons holding liens, which range in amount from \$40.37 to \$190.40, while the remainder, \$651.93, is awarded to the contractor.

We think that the judgment is appealable and that it should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

JOHN F. KLUMPP et al., Appellants, v. GUY H. GARDNER et al., Respondents.

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While one or more members of a copartnership cannot execute a general assignment for the benefit of creditors, with or without preferences, without the consent of all, if it appears by the acts or declarations, before or after the assignment of the member or members who did not sign, that he or they assented to making it, or that it was made by his or their authority, it is valid.

Defendants D. and G. were copartners; the firm being in straitened circumstances G. started for Australia, with a view of making sales of goods there in sufficient amounts to relieve it from its embarrassment, leaving D. in charge of the business. G. wrote D. from San Francisco urging him to continue the business and get extensions of time, but "should you have to make an assignment" then to make certain persons named preferred creditors and put in certain specified stocks as assets. The pressure from creditors became so great that G subsequently made a general assignment of the firm assets, executing it in the name of the firm, in the name of G. by D. "by authorization," and in his own name, and acknowledging it. Held, that the letter was to be understood as giving D. authority to execute the assign-

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ment at any time when it should become necessary during G.'s absence; and so, the assignment was valid; that while the attempted execution and acknowledgment in the name of G. was invalid, it might be treated as surplusage.

D. had, before making the assignment, paid the debts due the persons G. had requested him to prefer. *Held*, that the fact they could not be preferred did not terminate the authority to make the assignment.

(Argued March 27, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 2, 1888, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

James L. Bishop for appellants. The general assignment was void because it was not executed by G. H. Gardner, or with his consent. (*Welles v. March*, 30 N. Y. 344; *Williams v. Whedon*, 39 Hun, 98; *Fisher v. Murray*, 1 E. D. Smith, 341; *Burrill on Assign.* § 86; *Hitchcock v. St. John*, 1 Hoff. Ch. 511, 518; *Havens v. Hussey*, 5 Paige, 29, 31; *Gates v. Andrews*, 37 N. Y. 657, 659; *Hooper v. Beecher*, 7 State Rep. 406; 8 id. 898; *Beals v. Allen*, 18 Johns. 363; *Robertson v. Ketchum*, 11 Barb. 652; *Martin v. Farnsworth*, 49 id. 555; *Story on Agency*, § 62; 2 *Ewell's Ev. on Agency*, chap. 5; *Atwood v. Munnings*, 7 B. & C. 278; *Ferreira v. Depew*, 17 How. Pr. 418.) Neither the insolvency of the firm, nor the pressure of creditors, however great, will justify one partner by reason of the absence of his copartner, in executing an assignment on behalf of the absent partner. (*Welles v. March*, 30 N. Y. 344; *Robinson v. Gregory*, 29 Barb. 500; *Coope v. Bowles*, 42 id. 87; *Pettee v. Orser*, 6 Bosw. 123; *Loeb v. Pierrepont*, 58 Iowa, 469; *Nat. Bk. v. Sackett*, 2 Daley, 395; *Palmer v. Meyers*, 43 Barb. 509; *Kelley v. Baker*, 2 Hilt. 531.) The assignment was not acknowledged as required by law. (*Burrill on Assign.* [5th ed.]

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§§ 249, 376, 377; *Hardman v. Bowen*, 39 N. Y. 196; *Randall v. Dusenbury*, 63 id. 645; *Smith v. Boyd*, 101 id. 472; *Smith v. Tim*, 14 Abb. N. C. 447, and note; *Treadwell v. Sackett*, 50 Barb. 440; *Jones v. Bach*, 48 id. 568; *Lowenstein v. Flauraud*, 82 N. Y. 494; *People v. Walker*, 23 Barb. 304; 2 R. S. 756, § 4, 757, § 9, 759, § 15; *Gates v. Andrews*, 37 N. Y. 557.) The court erred in refusing to find material facts supported by uncontradicted evidence, which, if found, would have established or tended to establish that the assignment was made to hinder, delay and defraud creditors. (*Victor v. Henlein*, 34 Hun, 562; *White v. Fagin*, 18 Week. Dig. 358; *Izelin v. Henlein*, 2 How. Pr. 214; *Schultz v. Hoagland*, 85 N. Y. 464; *Untermeyer v. Hutter*, 26 Hun 147; *Talcott v. Hess*, 31 id. 282; *Mayer v. Kossuth Marx*, Daily Reg., Dec. 22, 1886; *Sheldon v. Sheldon*, 51 N. Y. 354; *Mason v. Lord*, 40 id. 476; *Bedlow v. N. Y. Floating Dry Dock Co.*, 20 State Rep. 707; *Amsdem v. Manchester*, 40 Barb. 158; *Hubbard v. Briggs*, 31 N. Y. 518; *Henry v. Foster*, Daily Reg. Oct. 19, 1887.) The plaintiffs' remedy at law was exhausted by the issue and return of the execution. (*Pierce v. Craine*, 4 How. Pr. 257; *Park v. Church*, 5 id. 381; *Chicester v. Cande*, 3 Con. 31; *Stephens v. Browning*, 1 Code R. 123; *Sears v. Burnham*, 17 N. Y. 445; Freeman on Executions, § 38; Code of Civ. Pro. §§ 721, 722, 723; *Douglas v. Haberstro*, 88 N. Y. 618; *Wright v. Nostrand*, 94 id. 47; *Bacon v. Cropsey*, 7 id. 195; *Renick v. Orser*, 4 Bosw. 384; *Oakely v. Becker*, 2 Cow. 454; *Grosvenor v. Hunt*, 11 How. 355; *Berry v. Riley*, 2 Barb. 307.) Whatever in this execution is a mere irregularity will be disregarded in this action. (*Laflin v. Relyea*, 7 Paige, 368; Herman on Executions, 48, § 60; 13 Tex. 379; Freeman on Executions, § 67; *Porter v. Goodman*, 1 Cow. 413; 19 Minn. 17; 12 id. 90; *Wright v. Nostrand*, 94 N. Y. 48.)

Henry P. Stackpole for respondents. Although authority in one or more of the members of a firm to make, without the other or others, a general assignment of the partnership prop-

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erty for the benefit of the firm's creditors, is not to be implied merely from the partnership relation nor from the single additional fact of the absence of the other partner or partners, yet such authority may be given. (*Darrow v. Bruff*, 36 How. Pr. 479; *Emerson v. Senter*, 118 U. S. 3, 7; *Osborne v. Barge*, 29 Fed. Rep. 725, 727; *Lowenstein v. Flauraud*, 82 N. Y. 494; 11 Hun, 399, 400; *Welles v. March*, 30 N. Y. 344, 351, 353; *Kelly v. Baker*, 2 Hilt. 531; *Nat. Bk. v. Sackett*, 2 Daly, 395; *Palmer v. Myers*, 43 Barb. 509, 513.) It was not necessary for Mr. Daggett to execute or acknowledge the assignment in the name of Mr. Gardner at all. Having authority to assign for the firm, his execution of the assignment in the firm name and his acknowledgment in his own name that he so executed it were sufficient. (*Welles v. March*, 30 N. Y. 344; *Baldwin v. Tynes*, 19 Abb. 32, 34; *Nat. Bk. v. Sackett*, 2 Daly, 395; *Lowenstein v. Flauraud*, 11 Hun, 399, 402; 82 N. Y. 494, 499; *Osborne v. Barge*, 29 Fed. Rep. 725; *Lovett v. Steam Saw Mill Assn.*, 6 Paige, 54, 59, 60; *Van Ness v. Bk. of U. S.*, 13 Peters, 17; *Johnson v. Bush*, 3 Barb. Ch. 207, 240; *Kelly v. Calhoun*, 95 U. S. 710, 712, 713; *Stewart v. Dutton*, 39 Ill. 91; *Frostburg Mut. Build. Assn. v. Brace*, 51 Md. 508, 511; *City of Kansas v. R. R. Co.*, 77 Mo. 180; *Eppright v. Nickerson*, 78 id. 482.) The certificate of acknowledgment is in due form. (1 Abb. N. P. and Forms, 15, Forms 5, 6; *Lowenstein v. Flauraud*, 82 N. Y. 494; *Claflin v. Smith*, 13 Abb. N. C. 241, 246, 247, 248; *S. C.*, 35 Hun, 372, 375; *Kelly v. Calhoun*, 95 U. S. 710, 713; *Basshor v. Stewart*, 54 Md. 376, 383; *Jackson v. Gumaer*, 2 Cow. 552-567; *Troup v. Haight*, 1 Hopk. 239; *Duval v. Covenhoven*, 4 Wend. 561; *Averill v. Wilson*, 4 Barb. 180; *Hunt v. Johnson*, 19 N. Y. 279, 294; *West Point Iron Co. v. Reyment*, 45 id. 703; *Smith v. Boyd*, 101 id. 472, 477.) The judgment will remain undisturbed if there is any evidence at all in the case to sustain the findings of the lower court. (*Shand v. Hanley*, 71 N. Y. 319, 322.) Plaintiffs are bound to prove fraud if they wish to establish it. Suspicious circumstances, even when unexplained, are not enough. They

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must show the suspicions to be well founded. All presumptions are in favor of innocence. (*Shultz v. Hoagland*, 85 N. Y. 464; *Bates v. McNulty*, 4 State Rep. 647.) The direction to levy improperly included the real property of the firm. (*Adsit v. Butler*, 87 N. Y. 585.)

HAIGHT, J. The plaintiffs, as judgment creditors, brought this action to set aside a general assignment for the benefit of creditors, made by the defendants Gardner and Daggett to the defendant Heald, upon the ground that the same was void, and was made with intent to hinder, delay and defraud creditors. The defendants, Gardner and Daggett, were copartners doing business as shipping merchants in the city of New York, under the firm name of G. H. Gardner & Co. The assignment was made on the 9th day of October, 1885, and was executed by Daggett, who first signed the firm name "G. H. Gardner & Co.;" underneath he signed the name "Guy H. Gardner, by David Daggett, by authorization." Then follows his own name. The assignee, Heald, also signed for the purpose of accepting the trust in accordance with the provisions of the statute. The assignment was executed in the presence of Henry P. Starbuck, who signed as a subscribing witness, and the same was acknowledged before a notary public by the defendant Daggett.

It is contended that the execution of the assignment and the acknowledgment thereof were not in compliance with the provisions of the statute, and that the instrument was, therefore, void. So far as Daggett attempted to execute the instrument in the name of Guy H. Gardner, and to acknowledge it in his name, we shall attempt no justification. We shall consider only the execution of the instrument by him in his own name and that of the firm, and to that extent the acknowledgment appears to be regular in form and sufficient. It thus becomes a question whether Daggett, as one of the members of the copartnership, could execute the assignment of the firm property. The rule appears to be unquestioned, and is to the effect that one or more members of a copartnership firm cannot

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execute a general assignment for the benefit of creditors, with or without preferences, without the consent of the other member or members of the firm. But if it appears from the acts or declarations of such member or members, either before or subsequent to the assignment, that he or they assented to making it, or that it was made by his or their authority, it is valid. The leading case upon this question which has been cited and approved in numerous cases, is that of *Wells v. March* (30 N. Y. 344), and, inasmuch as the rule is not questioned, no further citation from the authorities is necessary.

It thus becomes important to determine whether Daggett executed the assignment by the authority or with the consent and approval of Gardner.

It appears from the evidence that the firm was in somewhat straitened circumstances and that Gardner determined to take a trip to Australia, and to there attempt to make sales of goods, etc., in sufficient amounts to relieve the firm from its embarrassments and pay up its liabilities; that thereupon he left New York for Australia on the 30th day of May, 1885, leaving Daggett in charge of the business. After his departure, Daggett became frightened at the growing embarrassments of the firm, and telegraphed Gardner, at San Francisco, to give up the Australian trip and to return and help him. To this Gardner replied by wire that it would be folly; that he was to sail that noon, and then wrote him a letter, under date of June sixth, from which we make the following quotations bearing upon the question under consideration: "Now, as to my coming back, I have lain awake most of the night thinking over matters and trying to decide what is best, and I cannot see any way my return would benefit us, but can see much harm, not to mention the loss of \$500 in expenses. In the first place, my return would naturally make a great deal of talk, as it is known I have started, and what explanation could we give? In the second place, unless we did raise the money, we would be only worse off, for now if you have to ask for an extension of time, you can readily get it, as you

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will of course say that it is only to give me time to sell the goods we own and thus pay off everything, and I will do it, too; for, if you have not sold an interest, I can afford to give, and will, if necessary, give a large inducement to the trade there to give me orders from Cat, and I can guarantee \$25,000 in four to five months. * * * Should you have to make an assignment, make Mrs. A. a preferred creditor and Morton, B. & Co. for any outstanding drafts on credit. Don't forget to put in Iron Co. stock as an asset for 4,000 pounds (it will bring that easily), and Grenade stock for at least \$10,000."

The letter contains further statements of their assets and liabilities and the assurance that in six months' time they must come out right side up. He then exhorts Daggett to do the best that he can to keep the pot boiling until he could relieve him, to get extensions of time by giving notes, etc.

It further appears, from the evidence, that Daggett did continue the business until the ninth day of October, at which time the pressure from creditors was so great that the assignment in question was made. The authority from Gardner to execute the assignment, if such exists, is to be found from the foregoing letter and the circumstances under which it was written. The firm, as we have seen, was then in straitened circumstances; Gardner was at the point of sailing to a distant country, from which it took several weeks to communicate by mail. Daggett had been left in charge of the business. The letter directs him to continue it and to do the best he could to get extensions of time, etc. But should he have to make an assignment, to prefer certain creditors, naming them. Then follows directions in reference to certain assets.

It appears to us that this was intended and must be understood as giving Daggett authority to make an assignment, and that that authority extends to any time in the future during Gardner's absence in Australia when it should become necessary. The instructions to continue the business, to get extensions of time, etc., of necessity lead to this conclusion. It is true that the instructions required Mrs. A. and Morton, B. &

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Co. to be preferred. Mrs. A. referred to Mrs. Atwater from whom the sum of \$5,000 had been borrowed. Morton, B. & Co. referred to Morton, Bliss & Co. on whom Gardner was to draw his drafts for expenses while abroad. In continuing the business, Daggett had paid Mrs. Atwater her claim, and had also paid Morton, Bliss & Co. the drafts that had been drawn upon them by Gardner, so that, at the time of the assignment, there was nothing standing to their credit, and, consequently, they could not be preferred in the assignment. The argument to the effect that the letter only gave authority to make the assignment, upon condition that these persons should be preferred as creditors, and that their claims having been paid and disposed of so that they could no longer be preferred as creditors, the authority to make the assignment also terminated, appears to us to be untenable.

As to the acknowledgment, we have already said all that was necessary. If Daggett had authority to execute the assignment of the firm property, he had authority to execute it in the name of the firm and by himself, and to acknowledge it as such, and the attempt to acknowledge it, on the part of Gardner, individually, may be treated as surplusage.

Several exceptions were taken to the refusal of the trial court to find the facts as requested by the plaintiffs. We have carefully examined the evidence bearing upon these questions. There is evidence which sustains the findings of the trial court, and the General Term has affirmed the same. Inasmuch as these exceptions involve questions of fact, and the weight of evidence, we must consider them as finally disposed of in the court below.

It follows that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

WILLIAM J. COMLEY et al., Respondents, *v.* HENRY DAZIAN,
Impleaded, etc., Appellant.

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Plaintiffs executed to one F. a bill of sale of certain goods, absolute in form, but which was intended merely as security; the goods remained in plaintiffs' possession. Subsequently F., at the request of plaintiffs, transferred the goods by bill of sale to defendant. This was done under an arrangement that defendant should take possession of the goods and with the consent and approval of plaintiffs, and not otherwise, sell them and distribute the proceeds among plaintiffs' creditors as directed; the assignment being made to avoid trouble with creditors. Defendant sold the goods without such consent and retained the proceeds. In an action for conversion, *held*, that the transfer by F. was simply a formal waiver of his security and left plaintiffs at liberty to dispose of the property; and that, as under the agreement with defendant, the latter had no power to complete the sale or deliver the property until he had obtained plaintiffs' approval as to price, the unauthorized sale was a conversion; and so, the action was maintainable.

Also, *held*, that, in the absence of evidence of the acceptance or adoption of the arrangement by plaintiffs' creditors, they had no legal interest in defendant's promise as to distribution; that such direction was revocable and a demand made before commencement of the action was sufficient notice of plaintiffs' intention to revoke it.

Where one takes title to personal property simply to secure himself as surety upon a bond of his assignors, he has no interest in the property that he can sell until after a breach in the condition of the bond. His title is both personal and contingent, and by an assignment before the contingency named has happened, he parts with his security without transferring any right to his assignee.

An agent entrusted with property to sell at a price to be approved by his principal, if he sells without such approval, is liable for a conversion.

Reported below, 21 J. & S. 516.

(Argued March 27, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 1, 1886, which affirmed a judgment in favor of the plaintiffs, entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This was an action for conversion.

On the 16th of March, 1882, the plaintiffs assigned certain costumes and other theatrical property, then owned by them,

Statement of case.

to one Thomas M. Flemming by a bill of sale absolute in form. On the same day said Flemming gave them a receipt, stating that said bill of sale was not an absolute transfer, but was designed to secure him from loss as surety upon a bond signed by him for the plaintiffs in a suit then pending. After the settlement of said suit and on November 21, 1882, Flemming, at the request of the plaintiffs and pursuant to an arrangement between them and the defendant Dazian, transferred said property, which was still in the possession of the plaintiffs, to said Dazian and one D'Oyley Carte, who was originally joined as a defendant in this action, by executing to them a bill of sale thereof. The defendant Dazian sold the goods in violation of the agreement with the plaintiffs, who, after demand made, commenced this action. They allege in their complaint that they caused the property in question to be assigned and delivered to the defendants upon the agreement that said Dazian should solicit purchasers therefor, and, with the consent and approval of the plaintiffs, should sell the same and account to them for the proceeds; that all offers to purchase and the prices and terms of any proposed purchase should be submitted to them for their approval, and that no sales should be made without their consent. They further allege that the defendants sold and disposed of said property without the consent of the plaintiffs and received therefor the sum of \$5,000; that the goods were worth more than that amount, and that the defendants, upon demand made, refused to deliver the costumes or to deliver or account for the moneys received on the sale thereof.

The defendant Dazian, by his answer, denied that the goods were received under the arrangement claimed by the plaintiffs, and alleged that the agreement was that the defendants should sell the costumes at such prices as they deemed proper and apply the proceeds towards the payment of two debts owing by the plaintiffs, one to the defendants for \$2,500, and one to Dazian alone for \$1,850; that they accordingly sold the property for the sum of \$2,000, a price that seemed to them proper, and applied the proceeds upon said indebtedness.

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The jury found that the goods were worth \$4,000, and the complaint having been dismissed as to the defendant Carte, rendered a verdict for the plaintiffs against the defendant Dazian for \$2,000, that being the difference between the amount of his debt against the plaintiffs and the value of the goods.

Further facts appear in the opinion.

Matthew Hale for appellant. The defendant Dazian did not convert the costumes to his own use by selling them at a price not first approved of by plaintiffs. (*Sergeant v. Blunt*, 16 J. R. 73; *Laverty v. Southern*, 68 N. Y. 526; *Moore v. McKibben*, 33 Barb. 246; *Dickinson v. Dudley*, 17 Hun, 569.) By virtue of the bill of sale, and under the agreement conceded by plaintiffs to have been made with Dazian, the latter was vested with the legal title to the costumes, and held them as trustee for certain purposes, viz., to make a sale thereof and to divide the proceeds among certain specified creditors. The creditors, as well as the plaintiffs, became *cestuis que trust*, and the interest of the parties became fixed and determined. (*Tiemeyer v. Turnquist*, 85 N. Y. 516, 522, 523; *Knapp v. McGowan*, 96 id. 75; *Royer Wheel Co. v. Fielding*, 101 id. 504; *Leitch v. Hollister*, 4 id. 211, 214; *Van Buskirk v. Warren*, 2 Keyes, 119; *S.C.*, 4 Abb. Dec. 457.) The direction to Dazian to distribute the proceeds among the four creditors could not be revoked unless by and with the consent of the creditors themselves. (*Kelly v. Roberts*, 40 N. Y. 432, 438; *Berly v. Tailor*, 5 Hill, 533; *Williams v. Fitch*, 18 N. Y. 546; *Lawrence v. Fox*, 20 id. 268; *Gridley v. Gridley*, 24 id. 130; *Lowry v. Steward*, 25 id. 236; *Etna Nat. Bk. v. Fourth Nat. Bk.*, 46 id. 92; *In re Dutchess Co. v. Harding*, 49 id. 318; *Rogers Co. v. Kelly*, 88 id. 239; *Barlow v. Myers*, 3 Hun, 728; *Martin v. Funk*, 75 N. Y. 134.) The remedy of the plaintiffs for Dazian's misconduct was an action in equity. (*Day v. New Lots*, 107 N. Y. 148, 154; *Southwick v. First Nat. Bk.*, 61 How. Pr. 170; *Romeyn v. Sickles*, 108 N. Y. 650, 652; *Wood Co. v. Thayer*, 20 N. Y. St. Rep. 396;

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Town of Menth v. Cook, 13 id. 845; *Hollister v. Stewart*, 20 id. 941; *Hun v. Cury*, 82 id. 65; *Brinckerhoff v. Bostwick*, 105 id. 567; *Sorlore v. Scott*, 6 Lans. 271; *Bishop v. Houghton*, 1 E. D. Smith, 572; *Hill on Trustees*, 42, 518; *Code*, § 452; *Sherman v. Parrish*, 53 N. Y. 483.) This action was not triable before a jury. (*Bradley v. Aldrich*, 40 N. Y. 504; *Davis v. Morris*, 36 id. 569; *Wheelock v. Lee*, 74 id. 500.)

F. K. Pendleton for respondents. A bailee cannot deny the bailor's title. (*Cook v. Holt*, 48 N. Y. 275; *Cook v. Hall*, 46 id. 375; *Davis v. Bruno*, 23 Hun, 648; *Scholey v. Worcester*, 4 Hun, 302; *Haight v. Kaye*, L. R. [7 Ct. App. Cas.] 469; *Robbins v. Robbins*, 89 N. Y. 251.) Under the Code it makes no difference what the pleader calls the action, if there are facts stated in the complaint and proved sufficient to constitute a cause of action, the plaintiff is entitled to recover. (*Connaught v. Nichols*, 42 N. Y. 83; *Ladd v. Arkell*, 37 Super. Ct. 35; *Laverty v. Snethen*, 68 N. Y. 522; *Clements v. Iturria*, 81 id. 285; *Leroy v. Oser*, 5 Duer, 501; *Bush v. Lyon*, 9 Cow. 52; *Lucky v. Gannon*, 6 Abb. [N. S.] 212; *Roberts v. Traders' Ins. Co.*, 17 Wend. 631; *Creed v. Hartman*, 29 N. Y. 591.)

VANN, J. When Flemming gave a bill of sale to the defendants covering the property in question, he had never been in the possession thereof and he had no title thereto that he could transfer to another. Where one takes title simply to secure himself against loss as surety upon a bond, he has no interest that he can sell until after a breach in the condition of the bond. His title is both personal and contingent, and by an assignment before the contingency named has happened, he parts with his security without transferring any right to his assignee.

Under the circumstances of this case, Flemming's transfer was simply a formal waiver of his security and left the plaintiffs at liberty to dispose of the property as they saw fit.

The rights of Mr. Dazian, therefore, depend upon the verbal arrangement between himself and the plaintiffs. That agree-

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ment, as the jury is presumed to have found upon a conflict of evidence, was that the costumes were to be placed in the possession of Dazian, who was to sell them on commission, but no sale was to be made until the price was submitted to and approved by the plaintiffs. The sale was to be made for the benefit of the plaintiffs, but the proceeds were to be applied upon certain debts which they were owing to the defendants and others. It was also a part of the arrangement that the goods were to be assigned to the defendants in order to avoid trouble from creditors, but this was not done otherwise than as has been stated.

As Mr. Dazian sold without the knowledge or approval of the plaintiffs, the question arises, whether an agent, intrusted with property to sell at a price to be approved by his principal, is liable for conversion if he sells without such approval.

In *Sydes v. Hay* (4 T. R. 260), where the owner of goods on a vessel, moored at a certain wharf, directed the captain not to land them on that wharf, but he did so supposing that the wharfinger had a lien upon them for wharfage, it was held that the captain was liable in trover, upon the principle that it is a conversion for one who is intrusted with the goods of another, to put them into the hands of a third person contrary to orders.

In *Sarjeant v. Blunt* (16 J. R. 73), it was held that an agent who sold for \$300 a chronometer deposited with him for sale at not less than \$500, was guilty of breach of trust, but not of conversion.

These leading authorities, and the apparent conflict in principle that they represent, were, with many other cases, reviewed by this court in *Laverty v. Snethen* (68 N. Y. 522). The facts in that case were that an agent, with authority to negotiate a note, but not to let it go out of his reach without receiving the money, intrusted it to a third person, who promised to get it discounted and return the money, but who after procuring the discount kept the avails. It was held that the act of the agent in permitting the note to go out of his possession was an unlawful interference therewith and consti-

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tuted a conversion. The difference between that class of cases where certain acts were held to constitute a conversion and that class where certain other acts were held to constitute simply a breach of duty was noticed and the distinction pointed out that in the latter the agent did nothing but what he was authorized to do.

The court, through CHURCH, Ch. J., said : "He had a right to sell and deliver the property. He disobeyed instructions as to price only and was liable for misconduct, but not for conversion of the property, a distinction which, in a practical sense, may seem technical, but it is founded probably upon the distinction between an unauthorized interference with the property itself and the avails or terms of sale. At all events the distinction is fully recognized and settled by authority.
* * * The result of the authorities is that if an agent parts with the property, in a way or for a purpose not authorized, he is liable for a conversion ; but if he parts with it in accordance with his authority, although at a less price, or if he misapplies the avails or takes inadequate for sufficient security he is not liable for a conversion of the property, but only in an action on the case for misconduct."

We think this case is decisive of the point under consideration. Mr. Dazian did not simply depart from his instructions as to the manner of making the sale, but he had no right to sell at all until his principals had consented. His power to sell depended upon their consent, which he never received. His authority was limited to negotiating a sale, subject to their approval as to price, and until that approval was obtained he had no right to complete the sale or deliver the property. An unauthorized sale of personal property, with delivery of possession, is a conversion.

The appellant contends that as it was part of the agreement that he was to divide the proceeds of the sale among certain specified creditors, either a trust was created for their benefit or the arrangement was a direction as to distribution, which could not be revoked without the consent of said creditors.

No trust was created as to the goods themselves, because

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the title did not pass to the defendants. Although it was arranged that the plaintiffs should assign the costumes to them, it was incidental to the principal object of the agreement and was designed to facilitate performance by preventing annoyance from creditors. It was not, in fact, done, for Flemming's transfer, as has been held, was no more than a waiver of his right to hold the goods to secure himself against loss as surety.

The plaintiffs did not execute any written instrument in reference to the property, nor did they, by verbal agreement, assign any interest therein to the defendants.

No sale was made to them in trust or otherwise, but only a limited authority given to one of them to make a sale, subject to the approval of the plaintiffs as to price. While the creditors may have been interested in the performance of the contract, they had no beneficial interest in the contract itself, because they were not parties to it and the sale was to be made, not for their benefit, but for the benefit of the plaintiffs. (*Simson v. Brown*, 68 N. Y. 355; *Vrooman v. Turner*, 69 id. 280.)

There is no evidence of any acceptance or adoption of the arrangement by the creditors, and hence they had no legal interest in the promise of Dazian as to distribution. (*Wheat v. Rice*, 97 N. Y. 296.)

The direction as to distribution was not, therefore, irrevocable, but at any time before the creditors had charged their position it could be revoked by the plaintiffs. (*Kelly v. Roberts*, 40 N. Y. 432.)

The demand made before the commencement of the action was sufficient notice of the intention of the plaintiffs to revoke that part of the arrangement that related to the distribution among creditors. Moreover, as Dazian was not authorized to sell without the plaintiffs' consent, the creditors, simply as contract creditors, at least, could not have compelled a sale. This shows that it was not the intention of the plaintiffs to give a cause of action to the creditors, but to keep control of the matter themselves. As the sale was made without authority,

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it was not made under the contract, but in violation of it. Even if the creditors would have been interested in the proceeds of a sale, when regularly made with the approval of the plaintiffs, what interest could they have in a sale made in violation of the terms of the arrangement? Not having an interest in the property, nor any power to compel a sale thereof, they could not maintain an action for its conversion, and what the defendant Dazian should have done with the proceeds if he had sold in a lawful manner, it is not now important to consider.

If the appellant's theory were correct, that the creditors are necessary parties to the action, he should have specially alleged it in his answer. If he desired to raise the question that the agreement was designed to give a cause of action to the creditors and not to the plaintiffs, he should have asked that the jury be instructed to pass upon it.

We find no error that worked prejudice to the defendant, and the judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

**HOBART F. ATKINSON, as Receiver, etc., Respondent, v. THE
ROCHESTER PRINTING COMPANY, Appellant.**

This action was brought by plaintiff, as receiver of an insolvent state bank, to recover the amount of certain bills of exchange alleged to have been transferred by the bank to defendant in violation of the provisions of the act of 1882 (§§ 186, 187, chap. 409, Laws of 1882), which prohibits a conveyance, assignment or transfer by a bank, not authorized by a previous resolution of its board of directors, of property exceeding in value \$1,000, except in the transaction of its ordinary business (§ 186), and also prohibits giving a preference to creditors in case of insolvency and requires the creditor so given a preference to account for the money or property received to the bank's creditors or stockholders or their trustees. The following facts appeared: On December 16, 1882, the said bank was, to the knowledge of its president and cashier, insolvent. It continued business, paying all demands until the close of busi-

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ness on December nineteenth, when it stopped payment. At a meeting of its directors held that evening, at which its cashier was present, it was resolved that proceedings be commenced for the appointment of a receiver. On December sixteenth the bank discounted for defendant promissory notes and gave it credit for the avails, and on December eighteenth and nineteenth it received cash deposits. At the close of business December nineteenth there was a balance of \$3,004.22 to defendant's credit. On December twentieth, about an hour before the usual time of opening the bank for business, defendant's secretary went to the bank at the request of its cashier and received from him six bills of exchange aggregating \$3,180.32, the largest being \$988.68, giving defendant's check for the amount, dated December nineteenth; the cashier entered the transaction in the books of the bank under that date. The apparent overdraft of \$79.31 defendant paid at the request of plaintiff, who was then ignorant of the above facts. Having learned of them he made demand for the full amount of the bills. *Held*, that, as the aggregate amount of the bills transferred exceeded in value \$1,000, the transfer was prohibited, notwithstanding no one of them was of that value; that, as defendant was not a purchaser for value and the transaction was not in the usual course of business, it was illegal without regard to defendant's intent or whether it knew the bank was insolvent; also, that, although the reception of the deposits from defendant was a fraud, and as between it and the bank the latter acquired no title to them, and they might have been recovered from the bank or its receiver if they could have been identified or their avails traced, yet the transaction in question was not a restoration or restitution by the wrong-doer, but was a compensation for the fraud, which, in the case of an insolvent bank, is prohibited by statute; that the fact defendant became a creditor through the fraud of the bank officers, and, so, the bank was a trustee, *ex maleficio*, gave defendant no right to a preference over other creditors; and that the transaction between defendant and the receiver was not a settlement between the parties.

Reported below, 43 Hun, 167.

(Argued March 13, 1889; decided April 23, 1889.)

APEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1887, which modified, and affirmed as modified, a judgment in favor of plaintiff, entered upon a verdict directed by the court and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

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John Van Voorhis for appellant. It was error to refuse to submit the question of intent to the jury. (*Hanan v. Fisher*, 1 Cowp. 177.) The statute makes the question depend upon what was passing in the minds of the officers of the company when the payment was made. (*Paulding v. Crome Steel Co.*, 94 N. Y. 341.) Where one has been induced to part with property by the fraud of an officer of the bank, the party defrauded may, upon discovery of the fraud, rescind the contract and recover the property, or the proceeds thereof, unless it has come to the possession of a *bona fide* holder. (*Craigie v. Hadley*, 99 N. Y. 131; *People v. City Bank*, 96 id. 32; *National Bank v. Ins. Co.*, 104 U. S. 54; *Met. Nat. Bank v. Loyd*, 90 N. Y. 530; *Dows v. Kidder*, 84 id. 121; *Matter of Le Blanc*, 14 Hun, 8; 75 N. Y. 598; *Van Allen v. Am. Nat. Bank*, 52 id. 1, 7; *McLean v. State Bank of Syracuse*, BLATCHFORD, J., U. S. C. C.) The bank having obtained the defendant's money by fraud, they hold these moneys as the defendant's trustee. The relation, therefore, existed between the defendant and the bank of trustee and *cestui que trust*. The defendant was entitled to be first paid before the general creditors. (*People v. City Bank of Rochester*, 96 N. Y. 32; *Libby v. Hopkins*, 104 U. S. 303; *In re Le Blanc*, 14 Hun, 8; 75 N. Y. 598; *Van Allen v. Am. Nat. Bank*, 52 N. Y. 1; *Dows v. Kidder*, 84 id. 121; *Frith v. Cartland*, 2 H. & M. 417; *Pennell v. Deffell*, 4 De G. & M. G. 372; *In re Knatchell v. Hallett*, 1 L. R., 13 Ch. Div. 696; *National Bank v. Ins. Co.*, 104 U. S. 54; *McLeod v. Evans*, 28 N. W. Rep. 173; *F. and M. Nat. Bank v. King*, 57 Pa. St. 202; *Peek v. Ellicott*, 30 Kan. 156.) The defendant pleaded and proved an account stated and a payment of the balance, and it was error to take this question from the jury. (*Lockwood v. Thorn*, 11 N. Y. 170; *Toland v. Sprague*, 12 Pet. 300-334; *Murray v. Toland*, 3 Johns. Ch. 569; *Weed v. Small*, 7 Paige, 573; *Leacraft v. Dewey*, 15 Wend. 83; *Stoughton v. Lynch*, 2 Johns. Ch. 209; *Colburn v. Lansing*, 46 Barb. 37; *Hutchinson v. Bank of Troy*, 48 id. 302; *Dean v. Van Nostrand*, 23 Week. Dig. 97; *Manhattan Co.*

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v. *Phillips*, 53 Super. Ct. [J. & S.] 84.) The receiver is the representative of the bank and, like an assignee in bankruptcy, is bound by his acts and contracts the same as if made by the bank before its failure. (*Von Sachs v. Kretz*, 72 N. Y. 548; *Paige v. Cagwin*, 7 Hill, 361; *Williams v. Chapman*, 10 Conn. 8.) The banking code should be construed strictly, so far as its provisions are penal in their nature, or are innovations upon the common law. (*Crocker v. Whitney*, 71 N. Y. 161; *Landers v. Frank. St. M. E. Church*, 97 id. 119.)

Arthur C. Smith for respondent. The transfer not having been authorized by a previous resolution of the board of directors, and the amount exceeding \$1,000 in value, the conveyance was void, and plaintiff has made out a clear case under sections 186 and 187 of chapter 409 of the Laws of 1882, which are re-enactments of sections 8 and 9 of article 1, title 2, chapter 18, part 1 of the Revised Statutes. (*Furniss v. Sherwood*, 3 Sandf. 521; *Gillet v. Phillips*, 13 N. Y. 114; *Smith v. Hall*, 5 Bosw. 319; *Lawson on Presump. Ev.* 262; *Price v. Nat. Security Bk.*, 22 Fed. Rep. 697.) Ignorance of the insolvency of the bank on the part of the defendant, or absence of intent to obtain a preference are of no consequence. (*Brouwer v. Harbeck*, 9 N. Y. 589.) The defendant having received the drafts in payment of a pre-existing debt, could not be a *bona fide* holder of the property for value. (*Stalker v. McDonald*, 6 Hill, 93; *Schroeder v. Gurney*, 10 Hun, 416; *State of Tennessee v. Davis*, 50 How. Pr. 447.) The title to the money and paper deposited by the defendant upon the sixteenth, eighteenth and nineteenth passed to the bank. (*Met. Nat. Bk. v. Loyd*, 25 Hun, 101; 90 N. Y. 530.) There was no settlement of any differences between plaintiff and defendant, nor any pretense of a release or other acquittance from the plaintiff. (*Newall v. Smith*, 53 Conn. 72.)

FOLLETT, Ch. J. The City Bank of Rochester was incorporated under the general banking act of this state. As early as December 16, 1882, it became insolvent, which fact the president and cashier well knew. The bank continued business,

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paying all demands until the close of business on the nineteenth of December, when it stopped payment. At a meeting of its directors held in the evening of that day, at which the cashier was present, it was resolved that an action be begun in the Supreme Court, and an application made in the action for the appointment of a receiver, and that David Hayes, an attorney, be authorized to appear for the bank in the action and consent to the receivership. December twenty-third a judgment was entered in this action dissolving the corporation, because of its insolvency, and appointing a permanent receiver with the usual powers of receivers in such cases.

For sometime before December 20, 1882, the defendant had kept an account with the bank, which was overdrawn on the fifteenth of December, but to what amount does not appear. December sixteenth the bank discounted for the defendant promissory notes made by its customers and credited its account with the avails—

Amounting to.....	\$5, 598 05
December 18. Cash deposited.....	173 84
December 19. Cash deposited.....	1,236 94
<hr/>	
	\$7, 008 83

At the close of business, December nineteenth, defendant's checks had been paid and charged to the account, so that the balance standing to defendant's credit was \$3,004.22.

It was the custom to open the bank for business at ten o'clock. About nine o'clock in the morning of December twentieth defendant's secretary went to the bank, in response to the request of the cashier of the bank, and received from him six bills of exchange, aggregating \$3,180.32, the largest one being for \$983.63, and known in this litigation as the Loomis & Woodworth draft. Defendant's secretary returned to its office and drew a check for the amount of the bills, dated it December nineteenth, returned to the bank and delivered it to the cashier, who entered the transaction in the books of the bank under the date of December nineteenth. It is

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said that this check overdraw the defendant's account by \$79.31. There seems to be an unexplained discrepancy in the amounts given, but it does not affect the principle involved. February 9, 1883, the defendant, upon the request of the receiver, paid this alleged balance, \$79.31. Subsequently the receiver learned the facts above recited, and brought this action to recover the amount of the bills, upon the ground that they were delivered by the cashier and received by the defendant in violation of sections 186 and 187 of chapter 409 of the Laws of 1882.

The defendant insisted that the transfer was not prohibited by section 186, because no one of the bills was of the value of \$1,000; that receiving deposits from the defendant when the officers of the bank knew that it was insolvent, was a fraud; that the bank became a trustee *ex maleficio* of the fund, and that the cashier had the right to make restitution; and that, February 9, 1883, the parties to this action mutually stated and settled the account; and the defendant paid, and the plaintiff received \$79.31 in full settlement and discharge of all liability of the one to the other.

At the close of the evidence the defendant asked to go to the jury upon the following questions: (1.) Upon all of the questions of fact in the case. (2.) Whether the defendant was a *bona fide* holder of the bills for value? (3.) Whether the bank on and after December 16, 1882, was insolvent, and its officers expecting its immediate failure, and whether the receipt of the defendant's deposits on that and the subsequent days was not a fraud which prevented the bank from obtaining title to the deposits? (4.) Whether the account was stated and settled. These requests were refused, and the trial court directed a verdict for the amount of the bills, with interest, upon which a judgment was entered, which was modified by the General Term by deducting the Loomis & Woodworth draft for \$983.63, which the defendant had been unable to collect; and, as so modified, the judgment was affirmed. From this judgment the defendant appeals. The sections under which this action was brought provide:

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"§ 186. No conveyance, assignment or transfer not authorized by a previous resolution of its board of directors shall be made by any such corporation of any of its real estate, or any of its effects, exceeding the value of one thousand dollars ; but this section shall not apply to the issuing of promissory notes, or other evidences of debt, by the officers of the company in the transaction of its ordinary business, nor to payments in specie or other current money, or in bank bills made by such officers ; nor shall it be construed to render void any conveyance, assignment or transfer in the hands of the purchaser, for a valuable consideration, and without notice."

"§ 187. No such conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created or security given by any such corporation when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law ; and every person receiving by means of any such conveyance, assignment, transfer, lien, security or payment, any of the effects of the corporation, shall be bound to account therefor to its creditors or stockholders, or their trustees, as the case shall require. * * *

It is conceded that when the six bills of exchange were transferred, and for several days before, the bank was insolvent, which fact was well known to the president and cashier, indeed, a resolution had passed the board of directors that it should be placed at once in the hands of a receiver. It is also conceded that the transfer of the six bills had not been authorized by a previous resolution of the board of directors. The aggregate amount of the bills transferred exceeding in value \$1,000, the transfer was prohibited by section 186 above quoted, although no one of the bills was of that value. (*Gillet v. Phillips*, 13 N. Y. 114; *Smith v. Hall*, 5 Bosw. 319.) The defendant not being a purchaser for a valuable consideration, and the transaction not being within the usual course of business, the transfer was illegal under section 186 without regard to defendant's intent, or whether it knew that the bank was insolvent. (*Brouwer v. Harbeck*, 9 N. Y. 589.)

Opinion of the Court, per FOLLETT, Ch. J.

Whether the defendant was a *bona fide* purchaser of the six bills of exchange was not a question of fact for the jury. Nothing was paid for them, nor anything of value parted with, and the circumstances under which they were delivered admit of but a single conclusion, *i. e.*, that they were given and received with the intent of both parties to the transaction of preferring the demand of the defendant. Had the jury found for the defendant upon this issue, the court would have been compelled to set aside the verdict.

It was quite unnecessary to inquire of the jury whether the reception of the deposits from the defendant was a fraud, because the law so declares it. (Penal Code, § 601; *Cragie v. Hadley*, 99 N. Y. 131.) As between the defendant and the bank, it acquired no title to the notes and money deposited, and they might have been recovered from the bank, or its receiver, if they could have been identified or their avails traced into any fund or security. (*Cavin v. Gleason*, 105 N. Y. 256.) But the six bills received by the defendant never belonged to it; and it is not asserted that they were, in whole or in part, the proceeds of the deposits made by the defendant. The transaction was not a restoration or restitution by the wrong-doer, but was compensation by the wrong-doer for the fraud which had been perpetrated, which, in the case of an insolvent bank, is prohibited by the statute. The fact that the defendant became a creditor of the insolvent bank through the fraud of its officers, and the bank a trustee *ex maleficio*, gave the defendant no right to a preference over other creditors unless it could trace and recover its property. It was said in the case last cited: "It is clear, we think, that upon an accounting in bankruptcy or insolvency, a trust creditor is not entitled to a preference over general creditors of the insolvent, merely on the ground of the nature of his claim, that is, that he is a trust creditor as distinguished from a general creditor. We know of no authority for such a contention. The equitable doctrine that as between creditors equality is equity admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of

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duty, or that its loss involves greater apparent hardship in one case than another, unless it appears in addition that there is some specific recognized equity founded on some agreement, or the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment."

Whether the transaction between the defendant and the receiver of February 9, 1883, was a settlement between the parties was not a question for the jury. The receiver testified that when he received the \$79.31 from the defendant he was ignorant of the transaction out of which this action arose, and there is no evidence or circumstance in the case from which it could have been inferred that his testimony was untrue. There being no dispute about the facts, the question was not one of fact for the jury, but one of law for the court; and it was correctly held that the transaction did not amount to a settlement of the accounts between the defendant and the bank, and to a release of the defendant from liability to account for the unlawful preference received by it.

The judgment should be affirmed, with costs.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.

Judgment affirmed.

MARY SCHMITTLER, Respondent, v. ADAM SIMON, Appellant.

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Where words used, in their application to an instrument of which they are a part, are not entirely intelligible, oral evidence of the circumstances attending its execution may, as between the parties, be admissible to aid in the interpretation.

A draft was drawn upon defendant for \$900, payable at a time specified, with direction to charge the same against the drawer "and of" his mother's estate. Following the name of defendant in the draft was the word "executor." He accepted it, adding to his name the same word. In an action upon the acceptance it appeared that defendant was executor of the will of R. who was the mother of the drawer of the draft. The draft was indorsed over by the payee to his wife, the plaintiff. There was evidence tending to show that the draft was taken by the payee for plaintiff or with a view to transfer it to her. Defendant offered to show

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that when the draft was drawn it was understood between the drawer, payee and plaintiff that it was to be paid out of the drawer's interest in the estate; that defendant then stated in their presence he would not accept or become liable personally, and it was agreed that he should accept in his capacity as executor, to be paid only out of the drawer's interest in the estate. This evidence was objected to and excluded. *Held*, error; that the testimony was competent as bearing upon the understanding of the relation and the character of the liability defendant assumed by his acceptance.

Pinney v. Johnson (8 Wend. 500) distinguished.

Reported on a former appeal, 101 N. Y. 554.

(Argued March 19, 1889; decided April 28, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 3, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought against the defendant as an acceptor of a draft, of which the following is a copy:

“ NEW YORK, February 26, 1877.

“ Mr. Adam Simon, executor, will please pay to Johannes Schmittler or his order, on the first day of July, which will be the year 1879, the sum of nine hundred doll. with seven per cent interest, to be paid, besides, the amount, yearly, July month, and charge the amount against me and of my mother's estate.

“ WM. J. SCHAREN.”

Across the face was written: “Accept, Adam Simon, Executor;” and it was indorsed:

“ Pay to the order of Mary Schmittler the amount of note.

“ JOHANNES SCHMITTLER.”

The further material facts are stated in the opinion.

Charles C. Smith for appellant. All the parts and the whole context of an agreement, contract or other writing must be considered to arrive at the intention of the parties thereto. (*Chitty on Cont.* [5th ed.] 83, 84; *Id.* [9th ed.] 77; *Addison*

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on Cont. [3d ed.] § 224; 2 Parsons on Cont. [5th ed.] 501, 503, 505; 2 Kent's Com. 553-555; 2 Story on Cont. §§ 657, 658 a; Edwards on Bills [3d ed.] § 216; *Knapp v. Warner*, 57 N. Y. 668; *Springsteen v. Sampson*, 32 id. 707; *Wilson v. Troop*, 2 Cow. 228.) To hold an executor personally liable, the promise to pay must be unqualified. (Edwards on Bills [3d ed.] § 75.) It was the duty of the court to admit proof to show not only the meaning and application of the phrase alluded to, but the intention of the parties in using it. (Chitty on Bills [12th Am. ed.] 341.) The principle that, in all cases, the intention of the parties to an agreement should be carried out according to the sense in which they mutually understood it, is well established. (Chitty on Cont. [5th ed.] 75, 76; Id. [9th ed.] 85; Greenl. on Ev. § 287; Edwards on Bills [3d ed.] § 215; *White v. Hoyt*, 73 N. Y. 505, 511; *Hoffman v. Etna Fire Ins. Co.*, 32 id. 405, 413; *Potter v. Ont. & L. M. Ins. Co.*, 5 Hill, 149; *Barlow v. Coit*, 24 N. Y. 40; *Phillips v. Gal-lant*, 62 id. 256; 2 Parsons on Cont. [5th ed.] 499.) If the presumption is that the contract was made in a representative capacity, it should be so interpreted and applied. (*Chateau v. Suydam*, 21 N. Y. 182.) The purpose and intent for which a security was given may be shown, and it is not regarded as varying the legal effect of the instrument. (*Bainbridge v. Richmond*, 17 Hun, 391; *Bostwick v. Beach*, 31 id. 343; *Sheely v. Cannon*, 17 Week. Dig. 159; *L. S. Bk. v. T. R. & R. Co.*, 14 Ill. App. 141; *Brady v. Cassidy*, 104 N. Y. 147; Edwards on Bills [3d ed.] § 74.) The rule that parol evidence cannot be received to contradict or explain a written contract is relaxed, not only in cases of fraud, mistake and latent ambiguity, but is frequently admitted to point out and connect the contents of a paper with the proper subject-matter, and the precise object to which it is applicable. (Chitty on Cont. [5th ed.] 101, 104, 108; Byle on Bills, 159, note; *Julliard v. Chaffee*, 92 N. Y. 529; Greenl. on Ev. [3d ed.] §§ 90, 284 a.) Neither do the reasons which forbid, in some instances, the admission of parol evidence to alter or explain written instruments, apply to those contracts implied by operation of law, such as the law

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implies in respect to negotiable paper. (Byles on Bills, 158-162, note; *Pierce v. Irwine*, 1 Miss. 369; *Winston v. Boyden*, Id. 383; *Bai'ey v. Stoneman*, 41 Ohio St. 148; *Patterson v. Todd*, 18 Penn. St. 476; *Brickelbach v. Wilkins*, 23 id. 26; *Owings v. Grubb*, 6 J. J. Marsh. 31; *Barlow v. Fleming*, 6 Ga. 146; *Early v. Wilkinson*, 3 Gratt. 68; *Riley v. Garrett*, 9 Cush. 104; *Baker v. Scott*, 5 Richardson, 355; Edwards on Bills [3d ed.] §§ 167, 400.) Neither is the rule applicable when the original contract was verbal and entire, and part of it only was reduced to writing. (*Chapin v. Dobson*, 78 N. Y. 74; Greenl. on Ev. §§ 90, 283, 284 a; *Benton v. Martin*, 52 N. Y. 570; Add. on Cont. [3d ed.] § 243; *Rogers v. Hadley*, 2 H. & C. 227; *Harris v. Rickett*, 4 H. & N. 1; *Eighmie v. Taylor*, 98 N. Y. 288.) If two parties sign a memorandum of a contract upon the strength of a clear oral agreement that the writing is not to be binding until the happening of a given event, and the event never happens, there is no contract. (Addison on Contracts, § 247; *Pym v. Campbell*, 6 El. & B. 370; 25 L. J., Q. B. 277; *Rogers v. Hadley*, 2 H. & C. 227; *Lindley v. Lacey*, 34 L. J. C. P. 9; 17 C. B. [N. S.] 578; *Wallis v. Littell*, 13 id. 369; 31 L. J., C. P. 100; *Davis v. Jones*, 17 C. B. 634.) A contemporaneous agreement, whether oral or written, to modify the liability of the maker or acceptor is good as between the original parties. (Byles on Bills [6th Am. ed.] 155-157; *Wilson v. Randa'l*, 67 N. Y. 333; *Hope v. Balen*, 58 id. 380; *Van Brunt v. Day*, 81 id. 251; Edwards on Bills [3d ed.] § 164; *Duparquet v. Knubel*, 24 Hun, 653; *Bouen v. Nat. Bk.*, 11 id. 226; *Phillips v. Preston*, 5 How. [U. S.] 278; *Nichols v. Nelson*, 18 Week. Dig. 210; *S. C.*, N. Y. Daily Reg. Jan. 9, 1884; *Batterman v. Price*, 3 Hill, 171; *Rookstaver v. Glenny*, 3 T. & C. 248; *Wilson v. Dean*, 74 N. Y. 531; *Grierson v. Mason*, 60 id. 394; *Eighmie v. Taylor*, 98 id. 228; *Potter v. Hopkins*, 25 Wend. 417; *Lindley v. Lacey*, 34 L. J., C. P. 9; Stephen's Digest on Law Ev. chap. 12, art. 90; *Johnson v. Oppenheim*, 55 N. Y. 293; *Erskine v. Adrian*, L. R., 8 Ch. App. 756; *Morgan v. Griffith*, L. R.,

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6 Ex. 70; Chitty on Bills, 91.) When the oral agreement furnishes a part of the consideration for the written one, it is also competent to prove it on that ground. (*Guinnip v. Close*, 19 Week. Dig. 226; *Taintor v. Hemmingway*, 18 Hun. 458; 83 N. Y. 610.) A written, signed, simple contract may be delivered with an express parol condition precedent that it is not to take effect or be binding, except on the happening of a certain event. (Addison on Cont. § 247; *Hutchins v. Hutchins*, 98 N. Y. 56-63; Chitty on Bills, 340, 341.) The instrument may be so delivered, not only to a stranger, but by one party to another. And evidence of the parol condition is admissible, not only when it is relied on as a condition, but also when an action is brought on it as an agreement. (Byles on Bills, 161, 162, 243; *Robinson v. Mernaugh*, 21 Week. Dig. 311; *Guinnip v. Close*, 19 id. 226; *Benton v. Martin*, 52 N. Y. 570; *Chapin v. Dobson*, 78 id. 74; *Hutchins v. Hutchins*, 98 id. 56-63; *Johnson v. Oppenheim*, 55 id. 293; Story on Prom. Notes [2d ed.] §§ 149, 150, 291; *Julliard v. Chaffee*, *supra*; Parsons on Notes, 518-528; *Wis'lzenus v. O'Fallon*, 91 Mo. 184; *Bell v. Lord Ingestry*, 12 C. B. 317; *Bannerman v. White*, 31 L. J., C. P. 28; Bayley on Bills, 157, 178-181, 244-248; *French v. Wallack*, 12 N. Y. State Rep. 159; *Mason v. Hunt*, 1 Doug. 297; *Merchants' Bk. v. Griswold*, 72 N. Y. 472; Chitty on Bills [12th Am. ed.] 84, 91, 96, 97; *Dana v. Munson*, 23 N. Y. 564; *Clark v. Sisson*, 22 id. 312; *Atlantic Fire Ins. Co. v. Boies*, 6 Duer, 583; *Bernhard v. Brunner*, 4 Bosw. 528; *Bookstaver v. Jayne*, 60 N. Y. 146; *Davis Sewing Mach. Co. v. Best*, 105 id. 59; *Comstock v. Hier*, 73 id. 269; Bayley on Bills [2d Am. ed.] 169; *Stover v. Logan*, 9 Mass. 55; *Germania Bk. v. Taaks*, 101 N. Y. 445; Edwards on Bills, § 463; *Winter v. Livingston*, 13 Johns. 54; *Eighamie v. Taylor*, 98 N. Y. 228; *Hudson v. Walcott*, 39 Ohio St. 618; Addison on Cont. [3d Am. ed.] § 247.) To preclude the introduction of such testimony in this case, the plaintiff should have been a *bona fide*, and an innocent holder for value and without out actual or constructive notice of any terms, qualifications or

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conditions attached to its acceptance by the defendant, or of its invalidity. (Story on Bills [2d ed.] §§ 184, 187; Byles on Bills, 187, 194, 195, 196, 208, 243; *Mason v. Hunt*, 1 Doug. 297; *Merchants' Bk. v. Griswold*, 72 N. Y. 479; Chitty on Bills [12th Am. ed.] 91, 96, 97; Edwards on Bills [5th ed.] §§ 397, 442, 445, 446, 463, 517, 519; *Ricketts v. Pendleton*, 14 Md. 320; Bayley on Bills, 169; Id. chap. 12, 548 550; *Davis Sewing Mach. Co. v. Best*, 105 N. Y. 59; Story on Prom. Notes [2d ed.] 246, and notes.) It is always competent for the maker of a promissory note to fix the conditions and restrictions upon which it shall be transferred and to prohibit its transfer unless they be complied with; and the holder with notice thereof cannot recover if it is diverted from the purpose for which it was made. (*Ayres v. Doying*, 26 Week. Dig. 13; Chitty on Bills [12 Am. ed.] 330, 340; *Tinsdale v. Murray*, 9 Daly, 449; *Harman v. Hope*, 87 N. Y. 10; 3 Edwards on Bills, §§ 442, 448, 450, 451, 452; *Lattimer v. Hill*, 8 Hun, 171; *Small v. Smith*, 1 Denio, 583; *Daggett v. Whitney*, 35 Conn. 372; *Felters v. Muncie Nat. Bk.*, 34 Ind. 251; *Hedden v. Bishop*, 5 R. I. 29; *Hackerson v. Raiguel*, 2 Heisk. 329; *Denniston v. Bacon*, 10 Johns. 198; *Kasson v. Smith*, 6 Wend. 437; *Moore v. Ryder*, 65 N. Y. 440; *Nat. Bk. Gloversville v. Wells*, 79 id. 503; *Republic Bk. v. Young*, 41 N. J. Eq. 531.) The court erred in excluding all evidence as to whether the defendant received any consideration for the alleged acceptance, and as to whether the alleged draft was not purely and simply an accommodation and provisional paper, not founded on any consideration whatever, and of which the plaintiff had due notice and knowledge. (Story on Bills [2d ed.] §§ 180, 184, 187; *Wildsmith v. Tracy*, 80 Ala. 258; Edw. on Bills [3d ed.] §§ 446, 461, 462, 463, 469; Story on Prom. Notes, chap. 5; Bayley on Bills, chaps. 10, 420, 421; *Darnell v. Williams*, 2 Stark. 166; *Wiffin v. Roberts*, 1 Esp. 261; *James v. Hibbert*, 2 Stark. 304; *Sparrow v. Chesman*, 9 B. & C. 241; *De Lancy v. Mitchell*, 1 Stark. 439; Edw. on Bills, §§ 204, 440; Byles on Bills [6th Am. ed.] 206, 207; *Tillotson v. Grapes*, 4 N. H.

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444; *Earl v. Page*, 6 id. 447; *Pryor v. Coulter*, 1 Bailey, 517; *Cook v. Mix*, 11 Conn. 432; *Denniston v. Bacon*, 10 Johns. 198; *Amherst Academy v. Cowles*, 6 Pick. 427; *Payne v. Cutler*, 13 Wend. 605; *Barnes v. Finch*, 6 Root, 53; *Spalding v. Vandercook*, 2 Wend. 431; *Burton v. Steward*, 3 id. 236; *Rogers v. McKnight*, 4 J. J. Marsh. 154; *Johnson v. Titus*, 2 Hill, 606; *Lattin v. Vail*, 17 Wend. 188; *Scudder v. Andrews*, 2 McLean, 464; *Washburn v. Picott*, 3 Dev. 390; *Tenness v. Parker*, 24 Me. 289; *Stone v. Fowler*, 22 Pick. 166; *Ferguson v. Oliver*, 8 Sme. & M. 23; *Wise v. Neal*, 39 Me. 492; *Walker v. Squires*, Hill & Denio, 23; *Sawyer v. Chambers*, 44 Barb. 42; *Harwood v. Brown*, 23 Mo. App. 69; *Applegarth v. Robertson*, 65 Md. 493.) Even if the plaintiff had established her title by showing that there was only a partial failure of consideration, yet on that ground she could recover but *pro tanto*, being no more than the value she had parted with on taking the alleged draft, and the court erred in excluding evidence to that effect. (Edw. on Bills [3d ed.] § 469; Byles on Bills [6th ed.] 206, 207.) A total failure of consideration is a perfect defense, and a partial failure is a good defense *pro tanto*. (Edw. on Bills [3d ed.] § 469; Byles on Bills [6th ed.] 206, 207; *Haynes v. Cromwell*, 69 N. Y. 370; Story on Prom. Notes, 217; *Fairbanks v. Sargeant*, 104 N. Y. 108; *Moore v. Ryder*, 65 id. 438-442; *Cardwill v. Hicks*, 37 Barb. 458; *Lavorence v. Clark*, 36 N. Y. 128; *Harger v. Morrell*, 69 id. 370; *Brown v. Callaway*, 41 Ark. 418; Bayley on Bills, 531; *Kelly v. Freedman* 56 Mich. 321.)

Winchester Hall for respondent. It is no defense that defendant accepted the bill for the accommodation of the drawer, which the plaintiff knew. (*Grant v. Ellicott*, 7 Wend. 227.) If the words "as executor of Regina Scharen" be added to the acceptor's name, it would change neither the character nor the effect of the instrument, for it retains all of its features as a bill of exchange. (*Thatcher v. Dinsmore*, 5 Mass. 299; *Forster v. Fuller*, 6 id. 58; *Childs v. Monins*,

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2 Brod. & Bing. 462.) In actions upon contracts made by executors, however they may describe themselves therein, they are personally liable. (101 N. Y. 554.) The simple promise to pay interest made the debt personal to the defendant. (*Childs v. Monins*, 2 B. & B. 462; *Bradley v. Heath*, 3 Sim. 543; *Liverpool Borough Bk. v. Walker*, 4 De Gex & Jones, 29; *Sims v. Stillwell*, 3 How. [Miss.] 176.)

BRADLEY, J. Upon the review of a former trial, where the question presented had relation only to the legal import of the terms of the instrument in question, it was held that it was a bill of exchange and that the defendant was, upon his acceptance, personally liable to the plaintiff as indorsee of the paper. (101 N. Y. 554.) This is the review of the succeeding trial, and the admissibility of evidence offered by the defendant is now the subject of inquiry. The defendant was executor of the will of Regina Scharen, deceased. She was the mother of the drawer of the draft. There is some evidence tending to prove that the draft was taken by the payee for the plaintiff, who was his wife, or with a view to transfer it to her. The defendant offered evidence tending to prove that it was understood by the plaintiff and her husband, that the draft should be taken upon the security of the drawer's interest in the estate of his mother; that when the draft was drawn it was understood between the drawer, payee and the plaintiff that it was to be paid out of such interest in the estate; also, that the defendant then said, in the presence of all those parties, that he would not accept the draft or become liable upon it personally, and that it was then agreed or said between them that the defendant would accept the draft in his capacity as executor, to be paid only out of the drawer's interest in his mother's estate. This evidence was offered in various forms on inquiry, and upon objection of plaintiff's counsel, was excluded and exceptions taken. The general rule is, that when an agreement is reduced to writing it, as between the parties, is deemed to merge and overcome all prior or contemporaneous negotiations and declarations upon the subject, and that no

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oral evidence is admissible to vary, explain or contradict its terms. But it may be that it would have been admissible for the defendant to prove, if he could, that his acceptance was not to take effect as such until a certain event, then in the future, and that when the payee and the plaintiff received it they were advised of an arrangement to that effect. (*Seymour v. Cowing*, 1 Keyes, 532; *S. C.*, 4 Abb. Ct. App. Dec. 200; *Benton v. Martin*, 52 N. Y. 570; *Reynolds v. Robinson*, 110 id. 654; *Wilson v. Powers*, 131 Mass. 539; *Wallis v. Littell*, 11 C. B. [N. S.] 369.) In this connection reference may also be made to the proposition that the purpose for which a written contract is made may rest in a collateral oral arrangement, which may be shown to the effect that the design of it is different from that which its terms alone may indicate. (*Grierson v. Mason*, 60 N. Y. 394; *Juilliard v. Chaffee*, 92 id. 529; *Chapin v. Dobson*, 78 id. 74.) These propositions are not applicable when the conclusion is required that the writing contains the final consummation of the entire agreement between the parties. While the evidence so offered may bear the construction that there was an understanding between the parties to the draft that the liability of the defendant on the acceptance was dependent upon an ascertained interest of the drawer in the estate of his mother, and, in that event, to be incurred to the extent only of such interest, not exceeding the amount of the draft, we think such evidence cannot fairly be construed as tending to prove a collateral agreement suspending the inception or operation of the acceptance until some future event, or as tending to show that it was made for a purpose independent of the import of its terms, within the rule before mentioned. And, therefore, it is unnecessary to consider the question of the applicability of those propositions to negotiable paper. The consideration of a contract, in whatever form it may have been, may, as between the immediate parties to it, be the subject of inquiry. And in an action by the payee, upon a note made by an executor or administrator, on account of a debt which his testator or intestate left unpaid, such fact and that the assets of the estate were insufficient to

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pay the note, may be shown as a defense, wholly or partially, as it may appear that there was an entire or partial want of assets to pay the debt represented by the note. (*Bank of Troy v. Topping*, 9 Wend. 273; *S. C.*, 13 id. 557.) The question in such case is one of consideration for the promise, evidenced by the note supposed to have been founded wholly upon the assets of the estate which the maker represented. While the maker and payee of a promissory note and the drawer and acceptor of a bill of exchange are immediate parties to the paper, that relation of privity does not exist between the payee and acceptor; and as between them alone, the want of consideration is no defense; but the acceptor, for the purpose of his defense in that respect, must go further and prove that there was no consideration as between the drawer and payee. There was no purpose indicated in the evidence offered, to do that, and, therefore, it does not seem to have been competent for that purpose. The question now is, whether the evidence so offered was admissible for any purpose. On the former review, in referring to the contention that the draft was drawn upon a specific fund, the court said: "Considering the question, as we are compelled to do, from the language of the instrument alone, we are unable to agree to the interpretation that the draft was payable only from a particular fund," and added: "While the point is not free from doubt, we think a reasonable construction of the draft favors the conclusion that it (the fund) is mentioned only as a source of reimbursement;" and "if the language of the paper could be considered at all ambiguous, it was the duty of the defendant to limit his liability by apt words of acceptance when it was presented to him; but, as it is, he has unqualifiedly promised to pay a fixed and definite sum at a specified time, and, we think, should be held to the contract which other parties were authorized, by his acceptance, to infer he intended to make." It does not appear what view the court may have taken of the admissibility of evidence of the fact, and of the fact itself, if it had then appeared, that the payee and the plaintiff, when

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they received the draft, had been advised that it was drawn and accepted to be paid out of the drawer's interest represented by the defendant as executor. The question there was solely one of construction of the instrument as represented by its terms. And all that the court there necessarily determined was, that it did not appear by the terms of the draft that it was drawn upon a particular fund. That character would not be given to the draft upon doubtful construction as against the plaintiff, who was presumed to be a *bona fide* holder of it. The fact that the drawee was, in the draft, designated as executor, and that he added the like designation to his name subscribed to the acceptance, would not of itself import any other than a personal relation of the defendant to the instrument, as the word "executor" annexed to his name would presumptively be treated as merely descriptive of the person. But it might be given some substantial significance by other provisions, if those were such as to require it, in the instrument, and, in a proper case, this might be aided by extrinsic facts. The defendant, as executor, represented whatever interest the drawer of the draft had in the estate of Mrs. Scharen, deceased, and such interest must be obtained by him or whomsoever should become entitled to it, through the executor. That situation would have rendered a draft upon the latter for that purpose, and his acceptance, so qualified, legitimate. In that view it would seem that if the understanding of the parties to the draft, and the holder of it, was such, the *prima facie* import of the word "executor" might be overcome by evidence to the effect that it was used to qualify the liability of the defendant, and to show that it was assumed in his representative capacity only. This rule is applicable to other relations of a representative character, in like manner indicated, although the contract does not, in its terms, purport to have been made by or for the principal otherwise than by way of designation of the representative character of the person making it. The like presumption exists in that, as in this case, that the added designation is *descriptio personæ*, and the right to show the fact to be other-

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wise is dependent upon the knowledge of the other party to the contract that such was the purpose when it was made. (*Brockway v. Allen*, 17 Wend. 40; *Paddock v. Brown*, 6 Hill, 530; *Hicks v. Hinde*, 9 Barb. 528; *Horton v. Garrison*, 23 id. 176; *Auburn City Bank v. Leonard*, 40 id. 136; *Bowne v. Douglass*, 38 id. 312; *Lee v. M. E. Church, etc.*, 52 id. 116; *Babcock v. Beman*, 11 N. Y. 200.)

In such case it is open to explanation by evidence to show that the purpose, as understood by the parties to the transaction, was that the party so executing the contract intended to assume no personal liability. (*Hood v. Hallenbeck*, 7 Hun, 362-365, and cases before cited.) And when aided by such evidence, the fact that a payee in a note who indorses it, and a drawee in a draft who accepts it, are, as well as in the indorsement and acceptance, in that manner designated, may be entitled to some significance. (*Bowne v. Douglass, supra*; *Babcock v. Beman*, 11 N. Y. 200.) The distinction between the cases referred to and the present one, is that there was there a principal whose representative made the contract, which was a fact essential to the application of such rule upon the question of liability, while here the defendant, as executor, had no principal party to charge with liability upon his contract, and could represent no person as such. But he had duties to perform, as executor, in relation to the estate of his testatrix, amongst which was the duty to render his account and pay over, for the benefit of persons interested, such shares as they were entitled to from the estate; and if it was intended by the draft and acceptance, and such construction can, by aid of extrinsic facts, be allowed, that the defendant should be charged in the line of his representative duty merely, it would follow that he would be required to pay to the holder of the instrument to the extent of the sum mentioned, from the interest of the drawer in the estate, if it were sufficient for the purpose. That would be a proper liability of the defendant as such trustee, and the drawer and payee might depend upon the existence of that fund for payment. In the case of agency there is no fund but a principal

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to charge. It is difficult to see any well founded distinction for the application in the two classes of cases of the rule, which permits the introduction of evidence to show the intention and purpose in that respect, of the parties to and interested in the transaction, who were advised of such purpose when they assumed their relation to the contract.

In *Pinney v. Johnson* (8 Wend. 500), this question did not arise. There the administrators had been charged by judgment upon their bond to a third party on account of a debt due from their intestate, and which they alleged as a liability of the estate, and a deficiency of assets by way of defense. The replication charged that the defendants had sufficient assets to pay the judgment and the plaintiff's claim, etc. The question arose upon the demurrer to the replication. The plaintiff had judgment, with leave to the defendant to rejoin. The court held that the judgment upon the bond of the administrators did not bind the estate, although the bond purported to have been made by them in their representative capacity. It is evident if they had any defense within the case of *Bank of Troy v. Topping* (*supra*), it did not survive the recovery of the judgment upon it. If the presumption arising out of the *prima facie* relation assumed by the defendant to the draft in question prevail, he must be personally liable within the doctrine of the case last cited. We are not prepared to say that in the present case the defense will be aided by the words "against me and of my mother's estate" in the draft, or any construction which may be put upon them. There is certainly some obscurity as to the purpose for which they were used, and they may be said to present some ambiguity. For the purpose of the construction of the instrument, no words can be added or taken from its provisions, but where the words used, in their application to an instrument of which they are a part, are not entirely intelligible, oral evidence of the circumstances attending its execution may, as between the parties, be admissible to aid in the interpretation, in its application, of the language so used. (*Fish v. Hubbard*, 21 Wend. 651-662; *Field v. Munson*, 47 N. Y. 221.)

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For the reasons before given, we think the rejected evidence referred to should have been received, as bearing upon the understanding of the relation and the character of liability the defendant assumed by his acceptance of the draft. It is deemed admissible, in view of the designation which was given to the defendant in the draft, and in his acceptance of it, and by what appears on the face of the draft. (*Hicks v. Hinde*, 9 Barb. 531; *Laflin, etc., Co. v. Sinsheimer*, 48 Md. 411; *S. C.*, 30 Am. R. 472.)

This view is taken upon the assumption, as the offered evidence indicated, that the plaintiff and her husband were advised, when they received the draft, of the facts embraced in the offers of proof, otherwise the draft, as to the plaintiff, must, as on the former review, be treated as a negotiable bill of exchange, and no other interpretation can, by evidence of extrinsic circumstances, be given, nor, for that purpose, will the evidence be admissible. The fact that the draft was payable at a particular time and place, may be a circumstance entitled to consideration upon the merits, but they do not have the conclusive effect claimed for them by the plaintiff's counsel; and the same may be said in respect to the payments heretofore made by the defendant of interest upon the amount of the draft. We do not consider the effect of the acceptance by way of admission of assets in his hands belonging to the estate, or the force to which it may be entitled as such.

The only question now here, arises upon exceptions to the exclusion of evidence, which seems to have been well taken, and for that reason the judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except VANN, J., dissenting.

Judgment reversed.

Statement of case.

114 180
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ALFRED H. SMITH et al., Appellants, v. HENRY CLEWS,
Impleaded, etc., Respondent.

Plaintiffs, who were diamond merchants, delivered to one M., a diamond broker, a pair of diamond ear-knobs, taking from him a receipt as follows: "Received from Alfred H. Smith & Co. * * * a pair of single stone diamond ear-knobs * * * on approval to show to my customers. Said knobs to be returned to said A. H. Smith & Co. on demand." M. sold the diamonds to defendant C. In an action to recover their possession plaintiff offered to show that the words "on approval" had a recognized meaning in the diamond trade well-known to M.; that they were understood not to confer a power of sale, but authority merely to show diamonds to a customer and report to the owner. This evidence was excluded. *Held*, error; that the receipt upon its face did not import authority to sell; that with the words "on approval" stricken out it would be a complete contract, giving M. simply authority "to show" and binding him "to return on demand;" that those words, as ordinarily interpreted, were neither inconsistent with the authority or the obligation; and as it was to be presumed they had some meaning to the parties, and as this meaning did not appear from the contract, oral evidence was competent to show the intent of the parties.

Evidence is always admissible to explain the meaning of terms used in any particular trade when their meaning is material to construe the contract; this rule extends to forms of expression as well as to single words.

Evidence of usage is also admissible to apply a written contract to the subject-matter of the action, to explain expressions used in a particular sense by particular persons as to particular subjects and to give effect to language in a contract as it was understood by those who made it.

Also, *held*, that C.'s title to the diamonds depended wholly on M.'s authority to sell, and he was bound by such limitation as the owner had placed upon M.'s possession, and unless authority to sell existed, C., although acting in entire good faith, obtained no title; hence it was of no consequence whether or not C. knew of the custom of the trade.

An unauthorized sale of personal property, although for a valuable consideration, and to one having no notice that another is the owner, vests no higher title in the vendee than was possessed by the vendor.

Smith v. Clews (105 N. Y. 288) distinguished.

(Argued March 21, 1889; decided April 28, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 9, 1888, which affirmed a judgment dismissing the complaint ordered at the Circuit.

Statement of case.

The nature of the action and the facts are sufficiently stated in the opinion.

Esek Cowen for appellants. Evidence is always admissible to explain the meaning of terms used in any particular trade or occupation when their meaning becomes material in order to construe a contract; and the principle on which the rule is founded extends to forms of expression as well as to single words. (*Dana v. Fiedler*, 12 N. Y. 46.) Evidence of usage is received as is any other parol evidence when a written contract is under consideration. (*Walls v. Bailey*, 49 N. Y. 470; *Boosman v. Johnston*, 12 Wend. 573; Whart. on Ev. [2d ed.] § 962; *Birch v. De Peyston*, 1 Stark. Cas. 167; *Ehle v. Chittendenango Bk.*, 24 N. Y. 548; *Wachter v. Quenger*, 29 id. 548; *Bissell v. Campbell*, 54 id. 357; *Storey v. Solomon*, 6 Daly, 531; 71 N. Y. 420; *Coitt v. Commercial Ins. Co.*, 7 Johns. 385; *Astor v. Union Ins. Co.*, 7 Cow. 202.) Questions as to the meaning of particular words used in a special sense in a written instrument are for the jury. (*Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 17.) Whether given words of a contract were used in an enlarged or restricted sense, that construction should be adopted which is most beneficial to the promisee. (*Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405, 413; Coke on Litt. 183; *Mowatt v. Londesborough*, 3 El. & Bl. 307, 334, 335; *Gifford v. First Presby. Soc.*, 56 Barb. 114; *Marvin v. Stone*, 2 Cow. 781, 806; *Goodyear v. Ogden*, 4 Hill, 104; *Dawson v. Kittle*, Id. 107; *Hinton v. Locke*, 5 id. 437; *White v. Hayt*, 73 N. Y. 512.) Miers being an agent with a very special and limited authority, if he transcended such authority, his acts were void, and he could not convey a title even to a purchaser without notice. (*Gurreiro v. Peile*, 3 Barn. & Ald. 616; 2 Kent's Com. 625; Dunlop's Paley's Agency [ed. 1856] 212-220; *Gray v. Agnew*, 95 Ill. 315; *Barton v. Williams*, 5 Barn. & Ald. 395; Whart. on Agency, §§ 192, 194, 744; *Trudo v. Anderson*, 10 Mich. 357; *Taylor v. Plumer*, 3 Maul. & Sel. 562; Story on Agency, 113, § 78; *Delafield v. State of Ill.*, 26 Wend. 223; *Ives v. Davenport*, 3 Hill, 377.)

Opinion of the Court, per BROWN, J.

Albert A. Abbott for respondent. Evidence that the words "on approval," mentioned in the receipt, have a recognized "peculiar meaning" in the diamond trade was inadmissible. (*Harris v. Tumbridge*, 83 N. Y. 92; *Miller v. Burke*, 68 id. 615; *Silberman v. Clark*, 96 id. 522; *Union Trust Co. v. Whiton*, 97 id. 172.)

BROWN, J. This action was brought to recover the possession of two diamonds with their settings, constituting what is called, in the evidence, a pair of diamond ear-knobs.

The plaintiffs are dealers in diamonds having their place of business at No. 14 John street in New York city. On the 11th day of April, 1879, Borden W. Plumb, who was a diamond broker, introduced to Mr. Alfred H. Smith, one of the plaintiffs, one Elijah Miers, telling Smith that Miers thought that if he saw a pair of ear-knobs that suited him, he could sell them to Mr. Clews, and that he had brought him to the plaintiffs' store that he might see the assortment. Miers selected a pair which he said he thought would suit Mr. Clews, and it was then arranged that Smith should send them to him on the following day by Mr. Plumb.

Miers had, on two previous occasions, sold stones to Mr. Clews. On the first occasion he sold a pair for \$300, which proving unsatisfactory were returned and another pair substituted in their place, of the value of \$450.

On the day following the conversation at the store the diamonds were delivered to Plumb, who delivered them to Miers, taking from him at the time of the delivery a receipt, of which the following is a copy:

"NEW YORK, April 12, 1879.

"Received from Alfred H. Smith & Co., by their representative, B. W. Plumb, a pair of single stone diamond ear-knobs, 10 $\frac{1}{2}$ carats, of the value of fourteen hundred dollars 'on approval' to show to my customers. Said knobs to be returned to said A. H. Smith & Co. on demand.

(Signed.) "E. MIERS."

Opinion of the Court, per BROWN, J.

Miers soon after sold the diamonds to Clews for \$1,100, taking back in part payment the second pair that he had sold him for \$450, and receiving credit on Clew's book for \$650, of which \$550 was paid out by Clews for Miers' account, but for what purpose does not clearly appear from the evidence. Plaintiffs demanded the diamonds from Miers and from Clews, and this action was brought to recover their possession.

The case has been twice tried. On the first trial the plaintiffs had judgment, which was reversed in this court. (105 N. Y. 286.) On the second trial the complaint was dismissed, and the General Term having affirmed the judgment entered on such dismissal, plaintiffs appealed to this court.

After proving substantially the facts I have stated, the plaintiffs called as a witness Chester Billings, who having testified that he had been an importer and dealer in diamonds in the city of New York for thirty-six years, was asked whether there was a peculiar meaning given in the diamond trade to the words "on approval." This question was excluded on defendant's objection, and plaintiffs excepted. Plaintiffs then offered to prove by Billings and other witnesses that the words "on approval" mentioned in the receipt had a recognized meaning in the diamond trade, and were understood not to confer a power to sell, but authority merely to show diamonds to a customer and report to the owner, and that this meaning was well known to plaintiffs and to Plumb and Miers. This evidence was excluded on defendant's objection, to which plaintiffs excepted. Evidence is always admissible to explain the meaning of terms used in any particular trade, when their meaning is material to construe the contract, and the rule extends to forms of expression as well as to single words. Evidence of usage is also admissible to apply a written contract to the subject matter of the action, to explain expressions used in a particular sense by particular persons as to particular subjects, to give effect to language in a contract as it was understood by those who made it. (*Walls v. Bailey*, 49 N. Y. 470; *Silberman v. Clark*, 96 id. 524; *Boorman v. Johnston*,

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12 Wend. 573; *Dana v. Friedler*, 12 N. Y. 46; *Bissel v. Campbell*, 54 id. 357; *Hinton v. Locke*, 5 Hill, 437; *Newhall v. Appleton*, decided at this term of the court, opinion by PARKER, J.) The case shows that this evidence was excluded by the trial court because the plaintiffs did not bring it home to Mr. Clews. Obviously, Clews' knowledge of the custom had nothing to do with the question. No man can be divested of his property without his own consent, and, consequently, even an honest purchaser under a defective title cannot hold against the true owner. That "no one can transfer to another a better title than he has himself is a maxim," says Chancellor KENT, "alike of the common and civil law, and a sale *ex vi termini* imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vendor." (2 Kent's Com. 324, and cases cited.) The rightful owner may be estopped by his own acts from asserting his title. If he has invested another with the usual evidence of title, or an apparent authority to dispose of it, he will not be allowed to make claim against an innocent purchaser dealing on the faith of such apparent ownership. (*McNeil v. Tenth Nat. Bank*, 46 N. Y. 325.) But mere possession has never been held to confer a power to sell, and an unauthorized sale, although for a valuable consideration, and to one having no notice that another is the true owner, vests no higher title in the vendee than was possessed by his vendor. (*Covill v. Hill*, 4 Denio, 323.) Clews' title to the diamonds, therefore, depended wholly on Miers' authority to sell, and he was bound by such limitation as the owner had placed upon Miers' possession, and unless authority to sell existed Clews, although acting in entire good faith, obtained no title to the stones. It was, therefore, of no consequence whether or not Clews knew of the custom of the trade. The inquiry was, did Miers know of it, and had he contracted with reference to it? The offer was to show that the term "on approval" had a well understood meaning in the diamond trade, and as Miers was a dealer and broker in diamonds, if it had appeared that the term had a well understood meaning in the diamond

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business, he might fairly be presumed to have been acquainted with the meaning of the expression, and to have contracted in reference to such meaning. But the offer went further and proposed to show actual knowledge in Miers of the meaning of this term; and if such had been the fact, it would not have lain with him to have denied the well understood meaning of an expression used by himself in the agreement by which he acquired possession of the property, nor could he escape the effect of the application of such meaning to the subject-matter of the contract. This evidence was, therefore, admissible, and the exclusion error, for which there must be a new trial, unless the contract between the parties expressed the power to sell in language so well understood that there is no ambiguity, and no room, under the rules of law for parol testimony, to aid in its interpretation.

On the former appeal of this case the court construed the contract, in the light of the evidence then before it, to confer on Miers a power of sale, and if the same evidence was now before us we should feel constrained to follow that decision. It then appeared that plaintiffs, prior to the transaction in question, knew Miers to be a dealer in diamonds, and that the stones which on two former occasions he had sold to Clews had been obtained from plaintiffs through Plumb, who was their agent.

The court emphasized these facts, saying: "The plaintiffs were dealers in diamonds, and they knew Miers, and that he was engaged in the business of a diamond dealer. They had, on two former occasions, intrusted, through their agent, diamonds to Miers, who had sold them and accounted for the proceeds of the sale without any fault being found, so far as appears, on account of any lack of authority to sell. Now, upon these facts, what other meaning can be attached to that receipt than that Miers had power to take these diamonds and show them to the customer, and, if approved of by the customer, sell them to him? It can mean nothing else than an authority to sell the stones to the customer if they met his approval."

These facts do not appear in the case presented to us. On the contrary, it appears that Miers was personally unknown

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to plaintiffs until introduced by Plumb on April eleventh, and there is not the slightest evidence to justify the inference that the other stones sold to Clews had been obtained from plaintiffs or from Plumb. We have, therefore, no other dealings between the parties to aid us in interpreting the contract, and are confined to the single transaction out of which this action has grown. Upon the face of the contract it does not import an authority to sell. If the words "on approval" are stricken from the paper, it would appear to be a complete agreement, of plain meaning, in which the authority given is "to show" the diamonds, and the obligation is absolute "to return on demand." Such expressions are wholly inconsistent with an authority "to sell," and its meaning could not be plainer if the parties had inserted after the words "to show" the words "but not to sell." The words "on approval," as ordinarily interpreted, are neither inconsistent with an authority "to show" or an obligation "to return on demand." We must, however, presume that the parties intended some meaning by their use, and, as the meaning does not appear from the context, we have a case where parol evidence is admissible to enlighten the court, and to show the intent of the parties to the contract. (*White v. Hayt*, 73 N. Y. 512.) It is unfortunate that the case should not now present the same facts that were before the court on the first appeal. Why it does not we are not informed. But we cannot speculate as to what may be the real facts, and must confine our decision to the case now before us.

We think the court erred in excluding the evidence offered, and the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except FOLLETT, Ch. J., dissenting.
Judgment reversed.

Statement of case.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant, *v.* JOHN M. BURKARD et al., Respondents.

Defendants executed to plaintiff an instrument in writing by which, for a valuable consideration, they agreed that F., who the instrument stated "has purchased, or is about to purchase, anthracite coal" of defendant, "shall pay said company at such time or times, and at such prices as may be agreed upon" between them, "for all coal that may be shipped to him up to the 1st day of May, 1882." In case of default of F. defendants agreed "to pay for the same, whether the indebtedness be in open account or embraced in notes, drafts or bills of exchange." In an action upon the instrument the defense was that plaintiff had extended the term of credit given to F., at the time coal was purchased, without the assent of defendants. *Held*, untenable; that the instrument was not made with reference to any then existing contract between F. and plaintiff fixing the time of credit, and it neither expressed or by implication limited the period of credit to the time fixed when a purchase was made, but left it subject to any future arrangement.

K., one of the defendants, was a married woman, not engaged in any business, and it did not appear that the instrument was executed for her benefit or for that of her separate estate. *Held*, that a nonsuit was properly directed as to her.

Plaintiff offered to prove the terms of the first contract of sale made with F. after the execution of the instrument. This offer was rejected. *Held*, error.

(Argued March 26, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 23, 1885, which affirmed a judgment in favor of defendants, entered upon a verdict ordered by the court and denied a motion for a new trial.

This action was brought upon an instrument, a copy of which is set forth in the opinion, wherein, also, the material facts are stated.

William Nottingham for appellant. The defense of coverture was strictly personal to Katharine Fritchie, and in no way affected the liability of the other defendants. (*McGuire v. Johnson*, 2 Lans. 305; *Brumskill v. James*, 11 N. Y. 294;

Statement of case.

Hartness v. Thompson, 5 Johns. 160.) The instrument in question is a continuing guaranty. (*Pratt v. Matthews*, 24 Hun, 386.) A guaranty should receive such a liberal construction, in view of the business it is designed to promote, as will secure safety to the creditor and at the same time facilitate, rather than hamper, the operations of the debtor. (*Davis v. Copeland*, 67 N. Y. 127; *Gates v. McKee*, 13 id. 232; *Douglass v. Reynolds*, 7 Pet. 113, 122; *Lawrence v. McCalmont*, 2 How. [U. S.] 426; *Rochester City Bk. v. Elwood*, 21 N. Y. 88, 90; *Evansville Nat. Bk. v. Kaufmann*, 93 id. 273; *People v. Lee*, 104 id. 441; *Sickel v. Marsh*, 44 How. 91.) The holding of the courts below that the taking of renewal notes by the plaintiff's agents was an extension of time to the principal which operated to discharge the guarantors was error. The indebtedness was, notwithstanding, plainly within the scope of the guaranty. (*Davis v. Copeland*, 67 N. Y. 127; *White's Bk. v. Myles*, 73 id. 335; *Crist v. Burlingame*, 62 Barb. 351; *Gates v. McKee*, 13 N. Y. 232; *Douglass v. Reynolds*, 7 Pet. 113, 122; *Lawrence v. McCalmont*, 2 How. [U. S.] 726; *Evansville Nat. Bk. v. Kaufmann*, 93 N. Y. 273; *People v. Lee*, 104 id. 441; *Belloni v. Freeborn*, 63 id. 383, 388; *Sickle v. Marsh*, 44 How. 91; *Rochester City Bk. v. Elwood*, 21 N. Y. 88, 90; *Mason v. Pritchard*, 12 East, 227; *City Nat. Bk. v. Phelps*, 16 Hun, 158; *Merchants' Nat. Bk. v. Hall*, 18 id. 176; 83 N. Y. 338; *Michigan State Bk. v. Peck*, 28 Vt. 200; *Fox v. Parker*, 44 Barb. 541; *Merle v. Wells*, 2 Camp. 413.) Even the objection that a contract is void for illegality is available to the parties alone, and not to them after it has been executed. (*Merritt v. Millard*, 4 Keyes, 208; *Woodworth v. Bennett*, 43 N. Y. 273.) Defendants could protect themselves at any time by calling upon the plaintiff to collect of Florack when the account or securities held at the time of the request became due. (*Merchants' Nat. Bank v. Hall*, 83 N. Y. 345; *Agawam Bk. v. Strever*, 18 id. 502; *Pain v. Packard*, 13 Johns. 174; *King v. Baldwin*, 17 id. 384; *Colgrove v. Tallman*, 67 N. Y. 95.) The terms of the guaranty include, and were designed to include, the indebted-

Statement of case.

ness in suit and the renewal notes by which it was secured. (*Mount v. Lyon*, 49 N. Y. 552; *Merchants' Nat. Bk. v. Hall*, 18 Hun, 176; 83 N. Y. 338; *M. S. Bk. v. Peck*, 28 Vt. 200, 207, 208.) Every contract ought to be so construed that no sentence, word or clause shall be superfluous, void or insignificant. (Addison on Cont. § 220; *Ward v. Whitney*, 8 N. Y. 442, 446.) The indemnity taken by the sureties renders them liable notwithstanding any extension of time to the principal. (Brandt on Suretyship and Guaranty, § 302; *Kleinhaus v. Generous*, 25 Ohio St. 667.)

Herman D. Morris for John M. Burkard, respondent. There was such an extension of the time of payment to Florack as released the defendants from liability for the debt. (*Hubbard v. Gurney*, 64 N. Y. 466; *Place v. McIlwain*, 38 id. 96; *Pomeroy v. Tanner*, 70 id. 547; *Putnum v. Lewis*, 8 J. R. 389; *City Nat. Bk. v. Phelps*, 86 N. Y. 484; Brandt on Suretyship and Guaranty, §§ 316, 317; *Fellows v. Prentiss*, 3 Den. 512; *Meyers v. Wells*, 5 Hill. 463; *Bangs v. Mosher*, 23 Barb. 478; *Ins. Co. v. Devendorf*, 43 id. 444; *Samuel v. Howarth*, 3 Merivale, 272; Fell on Guaranty, 196; *Hall v. Hadley*, 5 Bing. 54; De Golyer on Guaranties, 414, 416; *Howell v. Jones*, 1 Cr. M. & R. 97, 107; *Coomb v. Woolf*, 8 Bing. 136; *Smith v. Townsend*, 25 N. Y. 479; Theobald on Prin. and Surety, 82; *Green v. Bates*, 74 N. Y. 333.) The guaranty cannot be construed to cover any extensions of the term of credit beyond that contemplated by the terms of sale. (*Ward v. Stahl*, 81 N. Y. 406; *McCusky v. Cromwell*, 11 id. 593; *Berkhead v. George*, 5 Hill, 434; Bailies on Surety and Guaranty, 144; *Bangs v. Mosher*, 23 Barb. 478; *Samuel v. Howarth*, 3 Merivale, 272; *Ins. Co. v. Devendorf*, 43 Barb. 444; *Fellows v. Prentiss*, 3 Den. 512; Theobald on Prin. and Surety, 82; De Golyer on Guaranties, 414; Brandt on Surety and Guaranty, §§ 102, 103; *Hall v. Hadley*, 5 Bing. 54.)

Satterlee & Yeoman for George Fritchie et al., respondents. The defendants were all discharged from liability by the exten-

Opinion of the Court, per FOLLETT, Ch. J.

sion of the term of credit to the principal debtor. (*Fellows v. Prentice*, 3 Denio, 512; *Samuel v. Howarth*, 3 Merivale, 272; *C. B. of Poughkeepsie v. Phelps*, 16 Hun, 158, 162; 86 N. Y. 484, 491, 493; *Kellogg v. Stockton*, 29 Pa. 460, 463; *N. M. Bank Assn. v. Conkling*, 90 N. Y. 116, 121; *Wood v. Stahl*, 81 id. 406; *Ludlow v. Simonds*, 2 Caine's Cas. 57, 58; *Place v. McIlvain*, 38 N. Y. 96, 99; *Pomeroy v. Tanner*, 70 id. 547; *Hubbard v. Gurnsey*, 64 id. 457, 466, 467; *Myers v. Wells*, 5 Hill, 463.) The defendant Katharine Fritchie can avoid her agreement on the ground of coverture. (*Saratoga Co. Bank v. Pruyn*, 90 N. Y. 250; *S. N. Bank v. Miller*, 63 id. 639; *Broome v. Taylor*, 76 id. 564.)

FOLLETT, Ch. J. In 1881 Frank J. Florack, of Rochester, New York, was a retail dealer in coal, which he purchased from the plaintiff. To enable him to purchase coal upon credit, an instrument (called in this litigation a guaranty) was executed and delivered to the plaintiff, on the day of its date, of which the following is a copy:

"For a valuable consideration to us in hand paid by the Delaware, Lackawanna and Western Railroad Company, at and before the execution hereof, the receipt of which is hereby acknowledged, we do hereby agree to and with the said company that Frank J. Florack, of the city of Rochester, state of New York, who has purchased, or is about to purchase anthracite coal of said company, shall and will pay said company at such time or times and at such prices as may be agreed upon between the said company and the said Frank J. Florack, for all coal that may be shipped to him up to the first day of May, A. D. 1882, and in default of his so doing, we agree to pay for the same, whether the indebtedness be in open account or embraced in notes, drafts or bills of exchange.

"Witness our hands and seals this ninth day of June, 1881.

"JOHN M. BURKHARD. [L. s.]

"GEORGE FRITCHIE. [L. s.]

"KATHARINE FRITCHIE. [L. s.]"

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It was conceded upon the trial that upon divers days between May 3, 1881, and November 5, 1881, Florack received from the plaintiff coal for which he agreed to pay \$15,398.85, and that between May 3, 1881, and May 8, 1882, he paid on this account \$12,697.21, leaving due and unpaid May 8, 1882, \$2,701.64, to recover which this action was brought upon the instrument above set forth. All of the defendants answered, alleging various defenses, all of which were abandoned upon the trial except: (1.) That the plaintiff had extended the term of credit given to Florack when the coal was purchased without the assent of the defendants, and thereby they were discharged from any liability as guarantors. (2.) That Katharine Fritchie was the wife of George Fritchie, was not engaged in any business, and that the guaranty was not given for her benefit, or for the benefit of her separate estate, and that she is not liable thereon.

The truth of the facts alleged in the defense herein designated as the second was conceded on the trial and a nonsuit was directed in favor of Katharine Fritchie.

The case does not disclose the contract, if any existed, between the plaintiff and Florack, at the date of the guaranty, prescribing the terms upon which coal had been or should thereafter be delivered; nor does it appear that there was any understanding upon the subject until in August or September, 1881, when Florack was compelled to order an unusual quantity of coal because the tracks of the New York Central and Hudson River Railroad Company were about to be elevated through the city, and connection with Florack's coal yard temporarily severed. At this time it was agreed between plaintiff and Florack that coal delivered during every calendar month should be paid for by Florack on the twentieth day of the succeeding month, if he could, but if he could not, the plaintiff was to accept his notes due in from one to three months; and if the coal was not sold at the maturity of the notes, that plaintiff would then be as lenient as it could be. Under this indefinite arrangement the subsequent deliveries

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were made, and October 20, 1881, Florack gave his note for \$2,500, due in three months, and November 21, 1881, he gave his note for \$2,596.58, due in three months. The first note was taken up January 23, 1882, partly by cash, and by a note for \$1,700, due in three months. The second note was taken up February 24, 1882, partly by cash and by a note for \$1,596, due in one month, which was taken up March 27, 1882, partly by cash, and by a new note for \$1,378, due in one month. The note for \$1,700 and the one for \$1,378 were dishonored, but subsequently were partly paid, and this action was brought to recover the remainder, which was conceded on the trial to amount, principal and interest, to \$2,974.95. The amount included in these notes represented but part of the price of coal delivered between September 12th and November 5, 1881. There was no dispute on the trial about any of the material facts, and at the close of the evidence, the court directed a verdict in favor of Burkhard and George Fritchie. Upon the decision of the General Term it was adjudged that the complaint be dismissed upon the merits as to all of the defendants, with one bill of costs in favor of George and Katharine Fritchie, and with one bill of costs in favor of Burkhard.

The defendants' agreement was that Florack should pay the plaintiff "at such time or times and at such prices as may be agreed upon between the said company and the said Frank J. Florack for all coal which may be shipped to him up to the 1st day of May, A. D. 1882; and in default of his so doing we agree to pay for the same, whether the indebtedness be in open account or embraced in notes, drafts or bills of exchange." It is plain from this language that the guaranty was not made with reference to a then existing contract between the plaintiff and Florack fixing the price of coal and the terms of payment, but with reference to a contract or contracts thereafter to be made, fixing the price of coal and the terms of payment; and that they had the right, in the future, to fix such prices and terms of payment, either cash or credit; and if credit, for such time or times upon open account, on notes, drafts or bills of exchange as they might mutually agree upon. The mode by

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which credit was given, a note, is expressly authorized by the guaranty, but the guaranty neither expressly nor by implication limits the period of credit to the time for which the first note might be given. If it be contended that the terms of the first agreement, made in August or September, between Florack and the plaintiff, must control, and that a subsequent extension of credit or change of the terms of sale would release the defendants from their contract, the answer is, that there is no evidence that the renewal of notes was not authorized by their agreement, and the plaintiff's offer to show the precise terms of this agreement, clearly relevant facts, was rejected. The court erred in rejecting this evidence, and, under the evidence given, in not directing a verdict for the plaintiff. The plaintiff, in form, appeals from the whole judgment, and against all of the defendants, although it does seem to question the correctness of the nonsuit granted in favor of Katharine Fritchie.

That part of the judgment which dismisses the complaint in favor of Katharine Fritchie should be affirmed, without costs to either party; but that part of the judgment which dismisses the complaint, with costs, in favor of George Fritchie and John M. Burkhard should be reversed and a new trial granted, with costs to abide the event.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Judgment accordingly.

Statement of case.

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DANIEL J. NOYES, Appellant, v. JOHN T. WYCKOFF,
Respondent.

Defendant held a chattel mortgage, given to secure a debt payable upon demand, covering a quantity of iron ore lying upon a farm owned by E., the mortgagor. E. sold the farm and the ore to plaintiff, the deed being made "subject to the existing liens;" the latter made a tender to defendant of \$3,200 in payment and extinguishment of the lien of the mortgage. This defendant refused to accept on the ground that the amount tendered was insufficient, and thereafter entered upon the farm and sold the ore, becoming himself the purchaser. In an action for conversion it was conceded by defendant that the tender was sufficient in amount, but it was claimed that it was defective in form. Plaintiff testified, as to the tender, as follows: "I tendered and offered the money to him unconditionally and in payment and extinguishment of his lien." *Held*, that the tender was insufficient, as it was conditioned upon an extinguishment of the lien, which condition plaintiff had no right to attach to the acceptance; also, that, as plaintiff had not assumed payment of the debt, and took upon himself no duty or obligation in reference thereto, he could not make a legal and valid tender, as a tender before the debt was due would be ineffectual to destroy the security, and the debt only became due on demand of defendant or tender by the debtor.

Where a tender is relied upon, the party pleading it must show it to have been absolute and free from all conditions.

Mem. of decision below, 30 Hun, 466.

(Argued March 25, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made the second Monday of September, 1883, which reversed a judgment in favor of plaintiff, entered upon the report of a referee and ordered a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

John L. Hill for appellant. The fact that the mortgage was given to secure a part of the consideration makes no difference with the right of a subsequent purchaser to extinguish the lien by tender. (*Kortright v. Cady*, 21 N. Y. 343; *Tuthill v. Morris*, 81 id. 99, 100: *Tiffany v. St. John*, 65 id. 314; *Frost v. Y. S. Bk.*, 70 id. 558.) The plaintiff's tender was sufficient both in amount and form, and extin-

Opinion of the Court, per BROWN, J.

guished the lien upon the ore. (*Wood v. Hitchcock*, 20 Wend. 47, 48; *Kortright v. Cady*, 21 N. Y. 366; *Frost v. Y. S. Bk.*, 70 id. 553; *Brown v. Owen*, 11 Q. B. 130; *Gassett v. Andover*, 21 Vt. 342; *Marsden v. Goole*, 2 Car. & K. 133; *Tiffany v. St. John*, 65 N. Y. 314; *Tuthill v. Morris*, 81 id. 94.) The plaintiff was liable for the entire quantity of ore which he sold. His act in selling and removing a part of the ore was a conversion thereof. (*S. S. Nat. Bk. v. Wheeler*, 48 N. Y. 492, 495; *Tiffany v. St. John*, 65 id. 314; 1 *Hilliard on Torts* [2d ed.] 90, 91; 2 id. 102.) Defendant cannot offset or recoup the debt against the damages. (Code, § 501; *Reed v. Latson*, 15 Barb. 9; *Peabody v. Bloomer*, 5 Duer, 678; 6 id. 53; 3 Abb. Pr. 353 *Drake v. Cockcroft*, 4 E. D. Smith, 10 How. 371.)

Edward F. Brown for respondent. The tender being clearly bad in form on plaintiff's own showing, his action must fail for want of a valid tender. (*Harris v. Jex*, 66 Barb. 232; 5 Abb. N. Y. Dig. 706, §§ 14, 15.) A chattel mortgage is a sale, not a pledge; it passes the legal title of the lien to the mortgagee, subject to being defeated only by performance of the condition, and liable to be forfeited and to become absolute in the mortgagee by default. (*Hulsen v. Walter*, 34 How. 385; 2 Abb. N. Y. Dig. 41, 42; *Butler v. Miller*, 1 N. Y. 496, 500.) If default is made in the payment of a sum secured by a chattel mortgage, the title vests absolutely in the mortgagee; and, if he then takes possession, the mortgagor is entitled to have the whole value of the property applied upon the debt unless a sale is made; in which case, if a deficiency arises, the mortgagor is liable for the amount. But a sale to the mortgagee himself is not such a sale as will change the relation of the parties. (*Pulver v. Richardson*, 3 T. & C. 436; 3 J. & S. 536; *Halstead v. Schwartz*, 1 T. & C. 559; *Burdeck v. McVanner*, 2 Denio, 170; *Dane v. Mallory*, 16 Barb. 46.)

BROWN, J. This case comes to us upon an appeal by the plaintiff from an order of the General Term of the second judicial department which reversed a judgment in his favor entered

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upon a report of a referee and directed a new trial. The plaintiff has given the usual stipulation for judgment absolute against him in case the order appealed from is affirmed. The defendant was the holder of a chattel mortgage upon a lot of iron ore lying upon a farm in New Jersey owned by Elizabeth Fitzgerald and known as the "Styles farm." The mortgage upon its face was given as security for the payment of a promissory note, bearing even date with the mortgage, made by Henry W. Fitzgerald, and payable, on demand, for the sum of \$1,900. Defendant also held a deed of the farm given as security for advances made to Miss Fitzgerald, but which was, in fact, a mortgage and admitted to be such. Plaintiff purchased the farm and the ore from Miss Fitzgerald on November 16, 1880. The deed of the farm was "subject to the existing liens." With reference to the chattel mortgage, the referee has found that it was intended to be drawn to secure the payment of \$3,102, and by mistake was drawn for the sum named in it, and it is admitted in the case, "that it was a valid lien upon said iron ore for at least \$3,100, and that plaintiff took title with knowledge of the existence of such lien and its amount, and that it was intended to be payable in, and is governed as a contract by the laws of New York." On December 3, 1880, plaintiff tendered to the defendant \$3,200 in payment and extinguishment of the lien of the mortgage on said iron ore. At that time defendant claimed more to be due to him than was tendered. No question is now made, however, that the tender was insufficient in amount, but the point is taken that it was defective in form.

Defendant refused to accept the amount tendered, and, on June 18, 1881, entered upon the farm and sold all the ore covered by the mortgage; and at such sale became himself the purchaser. This action was thereupon brought by the plaintiff to recover for a conversion of the ore, and he had judgment at the trial. If upon the record before us any sufficient ground appears for the reversal of the judgment entered upon the referee's report, the order of the General Term must be sustained. (*Mackay v. Lewis*, 73 N. Y. 382.)

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Numerous questions have been argued upon the briefs submitted, but it is necessary to refer to but two of them, as upon these the order of the General Term must be affirmed.

The tender made by the plaintiff was clearly bad in form. A tender of money in payment of a debt, to be available as a defense or as the foundation of an action in favor of the party making the tender, must be without qualification. There is no principle by which a party is to be absolutely barred from litigating his claim for a larger sum than that paid, merely because he accepts part. The actual acceptance of the amount tendered would only extinguish a claim in case it was the whole amount due. If less than the amount due is tendered and accepted, it would extinguish the debt *pro tanto*, and the creditor would be entitled to interest on the balance, and hold whatever security he had as indemnity for the payment of such balance. It follows that if the tender is relied on as a defense, or as the foundation of an action, the party pleading it must show it to have been absolute and free from all conditions, and such are the authorities.

In *Wood v. Hitchcock* (20 Wend. 47) the tender was "in full settlement and discharge of all demands which plaintiff held against him." It was held bad and within the rule that the party making the tender shall not make a protest against his liability. To request the creditor to sign a satisfaction piece vitiates the tender. (*Roosevelt v. Bull's Head Bank*, 45 Barb. 579.) To demand a receipt vitiates the tender. (2 Phil. Ev. 134.) To demand a receipt in full is bad. (*Wood v. Hitchcock, supra*; *Frost v. Yonkers Savings Bank*, 70 N. Y. 558.)

Here the plaintiff testified as to the tender as follows: "I tendered and offered the money to him unconditionally and in payment and *extinguishment of his lien* upon the iron ore mined on the farm and at Ironia Station, mentioned in his chattel mortgage," etc. It is claimed by the plaintiff that the use of the word "unconditionally" relieved the tender from the objection urged. Standing alone this word would undoubtedly have the meaning given it by the referee, but the express condition

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that followed it cannot be ignored. The tender is best tested by the effect its acceptance would have had upon the defendant, and it needs no argument to show that had it been accepted, it must have been upon the terms offered, viz., in payment of the debt and *extinguishment of the lien of the chattel mortgage*, for the words used have no other meaning. This was a condition which plaintiff had no right to attach to its acceptance. He could not say "I offer you this money in payment of your debt, but if you take it you must extinguish your lien upon the iron ore." Whether its acceptance would extinguish the mortgage was a question which defendant had a right to litigate, and to demand that in accepting the money offered defendant should create an estoppel, which would prevent him from litigating the amount due on the mortgage, was a condition which plaintiff could not attach to the offer, and which being coupled with it made the tender bad. Nor am I able to see, under the evidence and findings of the referee, that the plaintiff had the right to make a legal and valid tender of the debt for which the chattel mortgage was security. Clearly a tender of the debt before it was due would be ineffectual to destroy the security. The debt was payable on demand and would be due either on the demand of the defendant or on the tender of the debtor. The plaintiff did not assume payment of the debt in purchasing the property, and took upon himself no duty or obligation in reference thereto. So far as the contract between Fitzgerald and defendant is concerned, he is an entire stranger.

The defendant claimed the debt was due by reason of a demand made by him upon Fitzgerald, but the referee has found that no such demand was made and that the note was not due, and there is no evidence that Fitzgerald offered at any time to pay the debt.

In view of these facts, we think the plaintiff was not in a position to perform the condition of the mortgage by a tender of the debt, and nothing short of absolute payment by him and acceptance by the creditor could vest him with the title to the property.

Statement of case.

The order of the General Term should be affirmed, and judgment absolute ordered for defendant on the stipulation, with costs.

All concur, except FOLLETT, Ch. J., not voting.
Judgment accordingly.

ALDICE G. WARREN, as Receiver, etc., Respondent, *v.* ALANSON WILDER, Impleaded, etc., Appellant.

After the appointment of plaintiff as receiver in supplementary proceedings against J., the latter conveyed his farm to defendant A. in consideration of an agreement by A. to cancel and discharge a debt due from J. to him, pay all of plaintiff's claims, as receiver, and also pay and discharge certain other debts owing by J. The creditors specified assented to the arrangement. A. paid the amount due upon the judgment plaintiff then represented, together with his claims for costs and expenses, but, before he had paid the other debts named, G., another creditor, obtained a judgment against J., to which the receivership was extended. This action was thereupon brought to have the said conveyance declared fraudulent and void as to J.'s creditors. It appeared that A. had acted in good faith, without knowledge of G.'s claim, and that the price agreed to be paid was a full and adequate consideration. *Held*, the action was not maintainable; that by his agreement, and the adoption thereof by the creditors, whose claims he assumed, A. became legally bound as principal debtor; and as the creditor represented by plaintiff had no prior claim to defendant, but both were general creditors with equal equities, the latter was entitled to the benefit of the general rule that, when the equities are equal the legal title must prevail.

Sargent v. E. B. A. Co. (11 N. Y. State Rep. 68) distinguished.
Also, *held*, that the action was one "affecting the title to real property, or an interest therein," within the meaning of the provision of the Code of Civil Procedure (§ 191, sub. 8) limiting appeals to this court, and so the order of General Term granting a new trial was reviewable here although the judgment represented by plaintiff was less than \$500.

(Argued March 25, 1889; decided April 28, 1889.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 4, 1888, which reversed a judgment in favor of the defendant, entered upon a decision of the court on trial at Special Term.

Statement of case.

This action was brought to set aside a deed of certain lands, executed by defendant Joel Wilder to defendant Alanson Wilder, as fraudulent as against the creditors of the grantor.

Plaintiff was originally appointed receiver of the property of said Joel Wilder in supplementary proceedings in an action by one Arnold and others against said Wilder. The judgment in that action, and the receiver's costs and expenses, were paid and satisfied by said Alanson Wilder, pursuant to the agreement under which he received the conveyance sought to be set aside. Subsequently S. A. J. and A. Garrett recovered judgment against said Joel Wilder, and plaintiff's receivership was extended to that judgment.

Further facts appear in the opinion.

J. A. Stull for appellant. Title to real estate embraces the right to possession and every right or interest in it, except the bare naked possession. (*Ehle v. Quackenboss*, 6 Hill, 537; *Gage v. Hill*, 43 Barb. 44; *Powell v. Rust*, 8 id. 567; *Mann v. Cooper*, 25 N. Y. 180; *Little v. Dean*, 34 id. 452; *Wheeler v. Scofield*, 67 id. 311; *Nichols v. Voorhis*, 74 id. 28, 29; *Scully v. Sanders*, 77 id. 590; *Payne v. Becker*, 87 id. 153, 157; *Knapp v. Deyo*, 108 id. 518.) The law of this state allows an insolvent debtor, not having sufficient property to pay all his debts, to prefer, among his creditors, such as he chooses to pay in full, even though the effect of the transaction is to leave other creditors unpaid. And it also permits such of the creditors as are thus preferred to accept and receive transfers of the debtor's property, real or personal, in payment of or security for their debts, so long as it is done solely to secure payment of their own just claims, and not with the fraudulent intent of cheating the other creditors. (*Towsley v. McDonald*, 32 Barb. 605-611; *Auburn Exch. Bk. v. Fitch*, 48 id. 344; *Pond v. Comstock*, 20 Hun, 494; Bump on Fraud. Convey. 213, 217, 218, 226, chap. 7 on Preferences; *Seymour v. Wilson*, 19 N. Y. 417, 421; *Murray v. Briggs*, 89 id. 447-451.) Alanson, in accepting the transfer, in fact and by agreement, made himself their principal debtor in the place of

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Joel. (*Ayers v. Dixon*, 78 N. Y. 318, 323, 324; *Johnson v. Zink*, 51 id. 333; *Colgrove v. Tallman*, 67 id. 95; *Burr v. Beers*, 24 id. 178; *Wilcox v. Campbell*, 35 Hun, 254; *Lawrence v. Fox*, 20 id. 268.)

W. H. Whiting for respondent. The judgment upon which the action is founded being less than \$500, is not appealable to this court. (Code of Civil Pro. § 191, sub. 3; *Porter v. Williams*, 9 N. Y. 147, 148; *Lynch v. Johnson*, 48 id. 27, 33; *Wheeler v. Scofield*, 67 id. 311, 315; *Petrie v. Adams*, 71 id. 79; *Roosevelt v. Linkert*, 67 id. 447; *Nichols v. Voorhis*, 74 id. 28; *Scully v. Sanders*, 77 id. 598; *Payne v. Becker*, 87 id. 153, 157; *Wright v. Nostrand*, 94 id. 31; *Decker v. Decker*, 108 N. R. 128; *Trevett v. Barnes*, 28 Alb. L. J. 416; *Loos v. Wilkinson*, 110 N. Y. 195, 216.) This is an action in the nature of a creditor's suit. The complaint contains all the necessary allegations, viz.: The recovery of a judgment, the issuing of an execution, out of a court of record, against the property of the judgment-debtor, to the sheriff of the county where he resided, and the return of said execution by said sheriff wholly unsatisfied. (Code of Civil Pro. § 1871; *Porter v. Williams*, 9 N. Y. 147, 149; *Lynch v. Johnson*, 48 id. 27, 33; *Decker v. Decker*, 108 id. 128, 134.) The action does not affect the title to real property or an interest therein. (*Wheeler v. Scofield*, 67 N. Y. 311, 315; *Wright v. Nostrand*, 94 id. 31; *Loos v. Wilkinson*, 110 id. 195, 216; *Nichols v. Voorhis*, 74 id. 28; *Boswick v. Menke*, 40 id. 383.) Alanson Wilder was not a *bona fide* purchaser of said premises. (*Nickerson v. Meacham*, 14 Fed. Rep. 381; *Perry on Trusts*, § 219; *Thomas v. Stone*, Walker's Ch. 117; *McBee v. Lofis*, 1 Strobbart's Eq. 90; *Harris v. Norton*, 16 Barb. 264; *Doswell v. Buchanan*, 3 Leigh, 365; *Newland's Eq.* 145; *Beame's Pleas in Equity*, 347; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Harrison v. Southcote*, 1 Atk. 538; *Story v. Lord Windsor*, 2 id. 630; *Pardington v. Nichols*, 3 id. 304.) A purchaser who has not paid the full consideration is

Statement of case.

not protected as a *bona fide* purchaser. (2 Pomeroy's *Fq. Juris.* 750; Perry on Trusts, § 221; *Paul v. Fulton*, 25 Mo. 156; *Wormley v. Wormley*, 8 Wheat. 449; *Dugan v. Vattier*, 3 Black [Ind.] 245; *Lewis v. Phillips*, 17 Ind. Rep. 108; *Patten v. Moore*, 32 N. H. 382; *Blanchard v. Tyler*, 12 Mich. 339; *Palmer v. Williams*, 24 id. 328; *Hunter v. Simrall*, 5 Litt. [Ky.] 62; *Tourville v. Naish*, 3 P. Wms. 306; *Jones v. Stanly*, 2 Eq. Cas. 685; *Merritt v. Northern R. R. Co.*, 12 Barb. 605; *Jackson v. Cadwell*, 1 Cow. 622; *Freeman v. Deming*, 3 Sandf. Ch. 327; *Swayze v. Burke*, 12 Pet. 11; *Matson v. Heirs, etc.*, 42 Mich. 473; *Murray v. Ballou*, 1 Johns. Ch. 566; *Campbell v. Roach*, 45 Ala. 667; *Marsh v. Armstrong*, 20 Minn. 81; *Miner v. Willoughby*, 3 id. 255; *Spicer v. Watters*, 65 Barb. 227.) Joel Wilder was, at the time of the appointment of the receiver, the owner in fee simple of the farm. (*Berridge v. Glasser*, 32 Alb. L. Jour. 25.) A recital cannot control the plain words in the granting part of a deed. (*Huntington v. Havens*, 5 Johns. Ch. 23; *Chaplin v. Strodes*, 7 Watts, 410; *Marquis of Cholmondeley v. Lord Clinton*, 2 Barn. & Ald. 625; *Walsh v. Trevarion*, 15 Ad. & El. 734; *Bailey v. Lloyd*, 5 Russ. 330; *Moore v. Griffin*, 9 Shipley, 350; *Mitchell v. Morse*, 32 Alb. L. Jour. 395.) The grant in the premises of a deed controls the habendum clause. (*Mott v. Richtmyer*, 57 N. Y. 49, 63; *Tyler v. Moore*, 42 Penn. St. 386; *Jackson v. Ireland*, 3 Wend. 100; 4 Kent's Com. 468; 3 Wash. on Real Prop. [5th ed.] 469.) An estate in fee created by a will or deed cannot be cut down by a subsequent clause. (*Van Horne v. Campbell*, 100 N. Y. 287; *Roseboom v. Roseboom*, 81 id. 359; *Campbell v. Beaumont*, 91 id. 467.) On the 29th day of August, 1885, when Joel Wilder executed the deed to Alanson Wilder, Joel had absolutely no title to the property. The title to the whole estate was vested in the receiver. (Code of Civ. Pro. § 2468; *Verplanck v. Van Buren*, 76 N. Y. 247.) The inference of fraud from the facts proven and undisputed was inevitable, and, as matter of law, the court erred in giving judgment against the plaintiff. Joel Wilder

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must be deemed to have intended the natural and inevitable consequences of his acts, and that was to hinder, delay and defraud his creditors. (*Coleman v. Burr*, 93 N. Y. 17, 31.)

PARKER, J. A few days before the rendition of the Garrett judgment, upon which this action by the receiver is based, Joel Wilder conveyed his farm to Alanson Wilder. At that time Joel was indebted to Alanson in a sum exceeding \$700 and interest. The consideration for the transfer agreed upon was that Alanson should cancel and discharge his own debts and claims against Joel; pay and discharge all claims which the plaintiff, as receiver, then had against Joel; pay and discharge the debt of Joel to Louisa Wilder of \$400 and interest, and pay and discharge Joel's debt to Willard Wilder, amounting to \$260 and interest. The grantee paid the amount due upon the Arnold judgment, which the receiver then represented, together with his claims for costs and expenses. Subsequently an order was duly made extending the receivership of the plaintiff over the property of Joel Wilder so as to represent the Garrett judgment. Thereafter the plaintiff commenced this action, in which he seeks to have the deed from Joel to Alanson declared fraudulent as to the creditors of Joel Wilder, and that the defendants Alanson Wilder and Louisa, his wife, be decreed to convey the same to the plaintiff, as receiver.

The trial court found, as a matter of fact, "that such sale and conveyance was made upon full and adequate consideration, and was not made or accepted by said Alanson Wilder for the purpose or with intent to hinder, delay or defraud the judgment-creditors represented by the plaintiff as receiver;" and, as a conclusion of law, "that the conveyance of the interest of said defendant Joel Wilder was valid and effectual, and vested in said Alanson Wilder all the interest of said Joel Wilder thereto, on the 29th day of August, 1885," and rendered judgment in favor of the defendant dismissing the case upon the merits.

The General Term, not questioning the findings of fact

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made by the trial court, reversed the judgment of the Special Term solely upon the ground that the defendant had notice of the claim represented by the receiver before payment made to Louisa and Willard Wilder. Holding that because of such notice before full payment the case comes within the familiar rule "that the party relying upon the defense that he is a *bona fide* purchaser, entitled to hold, notwithstanding a prior equity, must show actual payment or performance before notice." From the findings of fact made by the court below, and the undisputed testimony, it appears that the defendant acted in good faith and without knowledge even of the Garrett claim; that he agreed to pay full and adequate consideration for the property; that he was a creditor of Joel Wilder; that he accepted the conveyance on the agreement that the indebtedness due to him from Joel should form a part of the consideration; that he agreed to pay the balance of the consideration as provided in the deed, to wit: "As a part of the consideration hereinbefore mentioned the said Alanson Wilder assumes and agrees to pay, according to the terms thereof, two certain promissory notes, executed by said Joel Wilder about three years ago, one for \$300 and interest thereon, and the other for \$100 and interest thereon; also one certain promissory note given by said Joel Wilder to one Willard Wilder about one year ago, for \$100 and interest thereon;" and that Louisa and Willard Wilder consented to the agreement by which Alanson was to assume and pay their claims, as provided in the deed.

Upon the making of the agreement and subsequent delivery and acceptance of the deed, with the adoption of the promise, on the part of the grantee, by Louisa and Willard Wilder, the defendant, Alanson Wilder, became the principal debtor, and the grantor his surety for the payment of the debts. (*Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 id. 178; *Ayers v. Dixon*, 78 id. 318.) The defendant paid the receiver according to the requirement of the deed and was liable as principal to pay the amount due to Louisa and Willard Wilder, but had not actually done so when he learned of

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the existence of the judgment which the plaintiff, as receiver, represents. The question presented, therefore, is whether or not a creditor who purchases property of his debtor in good faith, for the purpose of securing his debts, but has not actually paid the balance of the purchase-price, although legally bound and financially able to do so, when he learns that there are other creditors of his debtor, is in a position to assert title as against such creditors in an action brought to declare the conveyance fraudulent.

The court below held that he was not, and cited, as authority for such holding, *Sargent v. Eureka Bung Apparatus Company* (11 N. Y. State Rep. 68). In that case the plaintiff had an agreement with an inventor named Warren, which gave to the plaintiffs certain rights in a patent which were violated by an assignment of the patent from Warren to Bigelow, and by the latter to the defendant, and it appearing that the defendant had notice of plaintiff's equity before payment, the court held that a purchaser of patent-rights does not stand in the position of a *bona fide* purchaser as against a prior assignee of the vendor, unless he has made full payment before notice of the assignment; and in the course of a well-considered opinion the court says: "That when a purchaser is advised of a prior claim of another, which denies to the seller, as against him, the right to make the sale, he should desist from proceeding further to complete his purchase; or if he thereafter proceeds, in performance of his contract, to do so, subject to the equities of such party in whom rests the prior right."

The doctrine of that case is not applicable to this. This plaintiff did not have a prior claim to the defendant at the time of the conveyance. They were both general creditors of the debtor. As such their equities were equal, and the defendant having obtained title to the property, in good faith and for a valuable consideration, while his equity was the same as the judgment-creditor, represented by the receiver, is entitled to the benefit of the universal rule that when the equities are equal the legal title must prevail. (*Seymour v. Wilson*, 19 N. Y. 417.)

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The motion to dismiss the appeal must be denied. The action is brought to set aside a deed and to compel a conveyance, and is, therefore, an action "affecting the title to real property, or an interest therein." (*Nichols v. Voorhis*, 74 N. Y. 28.)

The order appealed from should be reversed, and the judgment of the Special Term affirmed, without costs.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Order reversed.

EDWARD B. MERRILL, Respondent, v. THE CONSUMERS' COAL COMPANY, Appellant.

Plaintiff's complaint set forth, in substance, that he was employed by defendant to act as its attorney for one year under an agreement by which he was to receive, as compensation for his services, a transfer of 300 shares of its capital stock; that he performed the services and demanded the stock, but defendant refused to deliver the same. Plaintiff asked to recover the stock or its value. The answer admitted the employment, but denied any express agreement as to compensation. Upon the trial it appeared the agreement, substantially as averred in the complaint, was made on the part of defendant by its president. Defendant moved to dismiss the complaint on the ground that there was no proof of authority on the part of its president to make the contract. *Held*, that the motion was properly denied, as the authority of the president was admitted by the answer; that if defendant desired to present the question that the president was not authorized to contract to pay in stock, the attention of the trial court should have been called to it; and this not having been done, that it was not available on appeal.

It appeared that defendant had, from its organization, employed attorneys by the year and paid them in its stock, that the contract had been made by the president, with the approval of the board of directors, and that plaintiff rendered the services called for by his contract with the knowledge of the directors. *Held*, that the evidence was sufficient to warrant a finding that the contract was approved of or acquiesced in by the directors.

(Argued April 15, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order

Statement of case.

made May 3, 1886, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts are sufficiently stated in the opinion.

Louis B. Schram for appellant. The president of the defendant corporation had no authority to make the agreement alleged by the plaintiff to have been made. (Laws of 1853, chap. 233, § 2; *Landers v. Frank St. M. E. Church*, 97 N. Y. 119; *Donovan v. Mayor, etc.*, 38 id. 291; *C. & N. W. R. Co. v. James*, 22 Wis. 194; *Alexander v. Cauldwell*, 83 N. Y. 480; *McDonald v. Mayor, etc.*, 68 id. 23; *Adriance v. Roome*, 52 Barb. 399, 411; *Salem Bk. v. Gloucester Bk.*, 17 Mass. 1-29; *Schenck v. Andrews*, 57 N. Y. 133; *Risley v. I. B. & W. R. R. Co.*, 62 id. 240, 245.) The authority to issue stock, vested in the trustees, cannot be delegated by them to the officers. (*R., etc., R. R. Co. v. Thrall*, 35 Vt. 536, 554; *Pike v. Bangor, etc., R. R. Co.*, 68 Me. 445; *Silver Hook Roud v. Ray Greene*, 12 R. I. 164; *Farmers' Mut. F. Ins. Co. v. Chase*, 56 N. H. 341, 346.) This is not a case of a plea of *ultra vires* by the defendant. The defense is that the contract upon which the plaintiff sues was not made. (Potter on Corp. §§ 541, 542; *Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258.) There was no ratification of the alleged agreement by the corporation defendant. (Taylor on the Law of Corp. §§ 211-213; *Harrington v. First Nat. Bk.*, 1 Sup. Ct. [T. & C.] 261; *Smith v. Kidd*, 68 N. Y. 130; *Clark v. Woodruff*, 83 id. 518; *Bluminghoff v. Agr. Ins. Co.*, 93 id. 495.) The answer, while admitting that plaintiff was employed, alleges that no agreement was made in regard to compensation; this is equivalent to an affirmative allegation that the plaintiff was to receive the just value of his services. (1 Greenl. on Ev. § 201; *Gildersleeve v. Landon*, 73 N. Y. 609; *Ins. Co. v. Newton*, 24 Wall. 32; *Credit v. Brown*, 10 Johns. 365; *Carver v. Tracy*, 3 id. 427; *Hopkins v. Smith*, 11 id. 161; *Perego v. Purdy*, 1 Hilt. 269; *Barnes v. Allen*, 1 Abb. Ct. App.

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Dec. 111, 119; *Smith v. Jones*, 15 Johns. 229.) The value of the stock in the defendant company was not proved. There was, therefore, no foundation laid for the amount of plaintiff's recovery. (*MacLeod v. Wakley*, 3 Car. & P. 311; *Hume v. Long's Representatives*, 6 Monroe, 116, 119.)

William S. Maddox for respondent. If the question of "authority" to contract, or of "ratification" by the board of trustees could have properly been raised on the trial under the pleadings, then the other evidence in the case is sufficient to sustain the verdict. (*Hooker v. Eagle Bank of Rochester*, 30 N. Y. 83; *Potter v. New York Infant Asylum*, 44 Hun, 367.) The managing officers of corporations now have the power to employ attorneys, or other agents, for the company without a formal resolution to that effect passed by the board of directors. (*Jackson v. N. Y. C. R. R. Co.*, 2 N. Y. Sup. Ct. [T. & C.] 653; *Le Grand v. M. M. Assn.*, 44 Supr. Ct. [12 J. & S.] 562; 80 N. Y. 638; *Hoag v. Lamont*, 60 id. 96-101; *Am. Ins. Co. v. Oakley*, 9 Paige Ch. 497, 501; *Mumford v. Hawkins*, 5 Denio, 355; *Western Bk. of Missouri v. Gilstrap*, 45 Mo. 419.) There was sufficient evidence of employment of plaintiff by the defendant, and of its terms, and of the ratification of and acquiescence in that employment by knowledge of the other officers and directors of the corporation, and of the rendering of the services to the company by the plaintiff, to authorize the verdict. (*Potter v. New York Infant Asylum*, 44 Hun, 367; *Root v. Olcott*, 42 id. 546.) It must be assumed upon this appeal that the contract was, when made, a legal contract, such as the corporation could make. (*Barnes v. Brown*, 80 N. Y. 527, 535.) A corporation, unless specifically prohibited thereto by the law under which it is organized, may contract to pay its debts with its stock. (*Moore v. H. R. R. Co.*, 12 Barb. 156, 158; *Hart v. Lauman*, 29 id. 410, 417, 418; *Reed v. Hayt*, 51 N. Y. Supr. Ct. 121; *Van Cott v. Van Brunt*, 82 N. Y. 535; Ang. & A. on Corp. § 590 a.) The medium of payment, by delivering 300 shares of the stock of the company, was selected

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for the convenience of the debtor. If it failed to avail itself of the arrangement made for its accommodation, after a demand for the stock by the plaintiff, no injustice is done by exacting the sum in money. (*Moore v. Hudson R. R. Co.*, 12 Barb. 158; *Hart v. Lauman*, 29 id. 417, 418.)

HAIGHT, J. This action was brought to recover three hundred shares of the capital stock of the defendant or their value. The complaint alleges that the plaintiff entered into an agreement with the defendant to render and perform legal services for the corporation and to act and appear for it as its attorney for the space of one year, and that he was to be paid therefor three hundred shares of the stock of the company of the par value of \$5 per share; that the services had been rendered and the stock demanded, but that no part thereof had been delivered to him. The answer admitted that the defendant employed the plaintiff to act for it as its attorney for the space and period of one year, but alleged that no definite agreement was made in regard to compensation. Upon the trial there was a conflict in the testimony as to the terms of the contract. The jury rendered a verdict in favor of the plaintiff for \$1,500, thus finding the contract as alleged in the complaint.

It appeared upon the trial that the agreement on the part of the defendant was made by its president. After the plaintiff had given his evidence, the defendant moved to dismiss the complaint upon the ground that there was no proof of any authority on the part of the president to make the contract. This motion was denied and an exception was taken. And, again, at the close of the testimony, the defendant's counsel renewed his motion to dismiss the complaint upon the ground that on all of the evidence there was nothing to show an employment by the corporation. This motion was also denied and an exception taken. It is now contended that the president had no authority to make the agreement with the plaintiff to pay him with the stock of the company; that the power to issue or dispose of stock is vested in the board of directors, and not in the president. It does not appear to us

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that this question was fairly raised by the exceptions taken. The answer, as we have seen, admitted the employment of the plaintiff for the term of one year. The corporation, by admitting so much of the agreement, admits the authority of the president to make the contract. The answer only denies that portion of the agreement which provides for the payment of the plaintiff in the stock of the company. It is as to this portion only that the appellant now claims that the president exceeded his authority; but in no place was the attention of the trial court called to the question of the excess of authority by the president. The motions to dismiss the complaint were general, and to the effect that there was *no* authority on the part of the president to make the contract, and do not call the attention of the trial court to the excess of authority now contended for. It seems that this was the way that the motions were understood upon the trial, for, at the close of the charge of the court to the jury, the defendant requested the court to charge, in substance, that if they found that the contract was made as asserted by the plaintiff, that the matter was not brought before the board of directors, and that there was, consequently, no agreement on the part of the corporation. The court then made its final ruling upon the proposition by stating to the defendant's counsel that his answer admitted that there was an agreement. To this ruling he appears to have acquiesced, as no exception was taken. Had the defendant desired to present the question of the excess of authority on review, he should have called it to the attention of the trial court.

But even if it should be held that the exceptions taken were sufficiently explicit to raise the question, still it appears to us that the motions were properly denied, for the reason that there is some evidence tending to show authority on the part of the president to make the contract. In the first place it is, as we have seen, admitted by the answer that the agreement had been made by the corporation employing the plaintiff for one year. The authority of the president to contract is thus conceded. It further appears from the testimony that the corporation had, from its commencement, hired attorneys to represent it by the

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year, and that the hiring had been done by the president with the approval of the board of directors; that he had, prior to the hiring of the plaintiff, paid the attorneys so hired by him in the stock of the company; that the plaintiff had performed the services called for by the contract, with the knowledge of the directors. It is true that the president testified that he did not recollect that the arrangement with the plaintiff had been brought up at any of the meetings of the directors, but he does not appear to be positive upon this point. He was a party in interest, and his credibility was for the jury. We are of the opinion that the foregoing facts, and the inferences to be drawn therefrom, are sufficient to warrant a finding that the contract of the president was approved or acquiesced in by the directors. These views render it unnecessary to determine the question as to whether the president had the power to agree to pay the plaintiff for his services out of the stock of the company without the consent of the board of directors.

The evidence of the plaintiff is to the effect that the president told him that the stock was of the actual value of \$5 per share at the time the contract was made. There is no evidence that the value of the stock changed after that time.. The court instructed the jury that this was some evidence from which they could find that its actual value was, at that time, \$1,500. No exception was taken to this charge. There is, consequently, nothing upon this branch of the case presented for review.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

SAMUEL McRICKARD, Respondent, *v.* GEORGE C. FLINT et al.,
Appellants.

The omission of an owner of a building in the city of New York used for business purposes, in which there is a hoisting elevator, to comply with the requirements of the statute of 1874 (Chap. 547, Laws of 1874), requiring that the openings in each floor shall be protected by such a substantial railing, and trap-doors to close the same, as shall be approved by the superintendent of buildings, and that such trap-doors shall be closed at all times, except when in actual use, is *prima facie* evidence of negligence, in an action by one lawfully upon the premises who has sustained injury in consequence of a failure to comply with the statute.

The exercise of the duty imposed by the statute is not dependent upon the action of the superintendent of buildings. The owner may not properly delay compliance until he shall receive directions, but it is incumbent upon him to call upon the officer for directions and approval.

In such an action it appeared that plaintiff went to the building to see one of the defendants. He was directed to another building in the rear; not finding the defendant there he returned to the building and seeing a folding door, one-half of which was partly open, entered. It was not the usual place of entry into the building. About nineteen inches from the door-sill was an open elevator hatchway, into which he fell and was injured. Plaintiff testified that he supposed this was the main entrance; that the hatchway was not within his view when he went on to the step before the door; that as he entered he saw the saddle of the door-sill and the floor, and supposed the latter was continuous; that he then raised his eyes and glanced into the sales-room through a glass partition; that he saw no elevator shafting, and that the door obscured the opening and he did not see it. *Held*, that the failure of plaintiff to stop and look around him when he entered did not, as matter of law, charge him with contributory negligence; and that the question as to such negligence was properly submitted to the jury.

Also *held*, that, for the purpose of showing that drawings or diagrams of the buildings presented by defendants on the trial did not correctly show the situation at the time of the accident, it was competent for plaintiff to prove that changes had been made since that time.

Reported on former appeal, 97 N. Y. 641.

Reported below, 13 Daly, 541.

(Argued April 16, 1889; decided April 23, 1889.)

APPEAL from judgment of the Court of Common Pleas, in
and for the county of New York, entered upon an order made

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June 7, 1886, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was brought to recover damages for personal injuries alleged to have been caused by defendants' negligence.

The material facts are stated in the opinion.

George H. Adams for appellants. Plaintiff was, at most, a mere licensee on defendants' premises; the duty of defendants toward plaintiff, as to its freight elevators, grows out of circumstances independently of any question of license to plaintiff to enter the premises; and in such a case as this there are no circumstances creating a duty on defendants' part to keep the freight elevators in any special condition, and consequently no obligation on defendants to remunerate plaintiff for his injuries. (*Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 395.) The mere fact that an injury occurs on premises under the control and in the possession of a party raises no presumption of wrong against him. (*Harris v. Perry*, 89 N. Y. 314.) The burden of proof rests primarily upon the party injured, and it is part of complainant's case to show affirmatively that his own carelessness did not contribute to the injury. (*Splittoff v. State*, 108 N. Y. 205, 216; *Homer v. Everett*, 15 J. & S. 298; 91 N. Y. 64; *O'Mara v. D. & H. C. Co.*, 18 Hun, 192; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 332; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 id. 248; *Totten v. Phipps*, 52 id. 354; *Wendell v. N. Y. C. & H. R. R. R. Co.*, 91 id. 420; *Tolman v. S. B. & N. Y. R. R. Co.*, 98 id. 198.) The motions to strike out the testimony of plaintiff and of the witness Schroeder which showed changes in the premises made after the time of the accident, and that the premises at the time of the trial were different from their condition at the time of the accident, should have been granted. (*Corcoran v. Village of Peekskill*, 108 N. Y. 151; *Payne v. T., etc., R. R.*, 9 Hun, 226; *Dougan v. Champlain Co.*, 56 N. Y. 1; *Dale v. D., L. & W. Co.*, 73 id. 468.)

Christopher Fine for respondent. The question as to whether the plaintiff was guilty of contributory negligence

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was one of fact to be submitted to, and determined by, the jury. (*McRickard v. Flint*, 97 N. Y. 641.) Where a trial has been before a jury, and a general verdict has been rendered, the Court of Appeals can deal only with questions of law, upon exceptions duly taken, and has no power to review the findings of fact by the jury. (*Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. 310; *Standard Oil Co. v. Amazon Ins. Co.*, 79 id. 506; *Strong v. B. & A. R. R. Co.*, 58 id. 56, 60; *Hynes v. McDermott*, 91 id. 451; *Hageman v. H. L. & I. Co.*, 50 id. 53, 55; *Hamilton v. T. A. R. R. Co.*, 53 id. 25; *T. A. R. R. Co. v. Ebling*, 100 id. 98, 100, 101.) The defendants were guilty of negligence, not only as matter of fact as found by the jury, but also as matter of law in failing to comply with the Laws of 1871 (Chap. 625, § 16); Laws of 1874 (Chap. 547, § 5). (1 *Bliss O. & W. Special Laws*, 533, 534, 543; *Willey v. Mulledy*, 78 N. Y. 310, 313, 316; *Wharton on Neg.* § 443; *McGrath v. N. Y., etc., R. R. Co.*, 63 N. Y. 522; *Massoth v. D. & H. C. Co.*, 64 id. 524; *Bartlett Co. v. Roach*, 68 Ill. 174; *Sheppard v. B. R. Co.*, 35 N. Y. 641; *Wilson v. S. T. Co.*, 21 Barb. 68.) This court correctly held, when the cause was first before them, that the plaintiff was not guilty of negligence, as matter of law, and that it was for the jury, solely, to determine whether, as matter of fact, the plaintiff was guilty of contributory negligence, and that question the jury, on the second trial, has properly found, as well as all the other issues of fact, in favor of the plaintiff. (*Gordon v. G. S. & N. R. R. Co.*, 40 Barb. 546, 550; *Dickerson v. Port Huron*, 29 Alb. L. J. 498; *Loucks v. Chicago*, Id. 496; *Ernst v. H. R. R. Co.* 35 N. Y. 9-28; *Evans v. City of Utica*, 69 id. 166-169; *Jamison v. S. J. & S. C. R. R. Co.*, 11 Rep. 217, 218.) The plaintiff had a right to assume that the defendants' statutory duty had been performed, and regulate his own conduct accordingly. (*Willey v. Mulledy*, 78 N. Y. 310, 315; *Terry v. Jewett*, id. 338, 344; *Erwin v. N. S. Co.* 11 N. Y. Week. Dig. 347; 88 N. Y. 184; *Weber v. N. Y. C. & H. R. R. Co.*, 58 id. 451.) The law did not even exact from the plaintiff, upon the facts, cir-

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cumstances and surroundings, an unusual or extraordinary degree of care, and he is entitled to recover, even though the case might have admitted of even a higher degree of care on his part (*Faro v. B. O. S. L. R. R. Co.*, 22 N. Y. 213, 216; *Cook v. N. Y. C. & H. R. R. Co.*, 3 Keyes, 476, 479.) The fact, too, that the plaintiff's mind was legitimately, naturally and lawfully occupied to a great extent, in looking after, and for Mr. Hand, with whom he was there to transact business, was a fact competent to go to the jury on the question of contributory negligence.) (*Eckert v. L. I. R. R. Co.*, 57 Barb. 555, 559, 560; *Driscoll v. Mayor, etc.*, 4 N. Y. Week. Dig. 461; *Wasmer v. D. L. & W. R. R. Co.*, 80 N. Y. 212; *Rexton v. Starin*, 73 id. 601, 602.) Defendants' objection to plaintiff's evidence, as to wherein the diagrams were inaccurate, was not taken in time. It should have been to the question, not to a refusal to strike out a part of the answer, or, even if the testimony had been improper or irresponsible, the court should even then have been asked to charge the jury to disregard it. That not having been done there was complete waiver. (*Baylie's Trial Pr.* 200, 201; *Platnor v. Platnor*, 78 N. Y. 90, 101, 102; *Briggs v. Waldron*, 83 id. 582, 585, 586; *Bradner v. Strong*, 89 id. 299, 307.) Defendants were, as matter of law, guilty of negligence in not having complied with the statutes. (*Willey v. Mulledy*, 78 N. Y. 310, 313, 314, 316; *McGrath v. N. Y. C. & H. R. R. Co.*, 63 id. 522; *Massoth v. D. & H. C. Co.*, 64 id. 524; *Sheppard v. B., etc., Co.*, 35 id. 641; *Wilson v. Susquehanna, etc., Co.*, 21 Barb. 68; *Bartlett Co. v. Roach*, 68 Ill. 174.)

BRADLEY, J. On February 4, 1880, the plaintiff entered the defendants' building and place of business on West Fourteenth street in the city of New York, and fell into an uncovered elevator hatchway and was injured. He claims that such injury was occasioned wholly by the negligence of the defendants. This building was a manufactory of the defendants, and the elevator was there for the purpose of their business.

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The principal ground of the alleged negligence of the defendants is that they had failed to comply with the statute, which provided that "In any store or building in the city of New York in which there shall exist or be placed any hoisting elevator or well hole the openings thereof, through and upon each floor of said building, shall be provided with and protected by a substantial railing and such good and sufficient trap-doors, with which to close the same, as may be directed and approved by the superintendent of buildings; and such trap-door shall be kept closed at all times except when in actual use by the occupant or occupants of the building having the use and control of the same," etc. (Laws of 1874, chap. 547, § 5.)

There was no railing or any obstruction in the way of approach to this elevator shaft from the front door opposite to it, and although the evidence tends to prove that the elevator was not in actual use at the time the plaintiff so entered and fell, there was no trap-door over the hole. The exercise of the duty imposed upon the defendants by this statute, was not dependent upon any action of the superintendent of buildings. They could not properly delay for him to direct, but it was for them to call on him for direction and approval in that respect. (*Willey v. Mulledy*, 78 N. Y.: 310.)

The situation had been the same for several years, and it does not appear that any direction or approval of that official had been obtained from or given by him. The failure to perform a duty imposed by statute, where, as the consequence, an injury results to another is evidence upon the question of negligence of the party chargeable with such failure. (*Jetter v. N. Y. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *McGrath v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 523; *Massoth v. D. & H. C. Co.*, 64 id. 524; *Willey v. Mulledy*, 78 id. 310; *Knupfle v. Knickerbocker Ice Co.*, 84 id. 488.) It is not conclusive evidence of negligence. And the question presented here is, whether there was error in the charge of the court to the effect that any one constructing or using an elevator upon his premises is considered as doing so with knowledge of the law in that respect, and if such person fails to

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comply with the requirements of the statute he is, *prima facie*, guilty of negligence. The defendants' counsel excepted to so much of the charge as states that "a failure to comply with the provisions of the law of 1874 is *prima facie* evidence of negligence." As an abstract proposition there was no error in the charge. It had reference to the failure to perform the statutory duty, unqualified by any circumstances bearing upon the question, and was not necessarily applied to the present case so as to treat the question of negligence of the defendant as one of law. It was a question for the jury, and, upon the request of the defendants' counsel, they were instructed that the plaintiff could not recover unless the jury found that the defendants were negligent in the use of their premises, and that if the condition of the doors and the elevator and its use by the defendants were reasonable, the plaintiff could not recover. The evidence was such as to justify the conclusion that the defendants were chargeable with negligence. And they owed to any person who should lawfully go into the building the duty, which the statute imposed upon them, to do him no injury by their negligence in that respect. That duty they owed to the plaintiff who went to the premises for a legitimate business purpose. The statute is a salutary one to require the owners or occupants of business places in the city to guard, so far as required by it, against danger of personal injury to those lawfully there and to which they otherwise might be exposed. Its purpose was to provide against personal peril, and it may be assumed that the legislature was advised that such provision was essential to such protection. In view of this statute the cases cited upon the question of the defendants' negligence and their duty in that respect, which they owe to others, do not, necessarily, have application to the present case.

But the defendants' negligence alone will not support the plaintiff's recovery. The burden was with him to show that he was free from negligence. And if he failed to make it appear that he was without fault in that respect, the plaintiff was not entitled to recover. It is urged on the part of the

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defense that, upon the facts, as presented by the evidence, the plaintiff must, as matter of law, be chargeable with contributory negligence. This, evidently, was the view taken on the first trial, but, on review of that trial, the court held otherwise, and reversed the judgment entered upon dismissal of the complaint and granted a new trial. (97 N. Y. 641.) And the reasons given in the opinion of the court then delivered were, "that the facts proved did not justify the conclusion, as matter of law, that there was contributory negligence on the part of the plaintiff, or that there was such an absence of evidence upon the point that a finding of the jury that the plaintiff was free from contributory negligence could not be allowed to stand." The plaintiff's counsel asserts that the case of his client was, at least, as favorably presented for him by the evidence on the last as on the former trial. While there were some disputed facts, there was but very little conflict in the evidence as to the situation at the time of the accident, and in relation to the circumstances attending it. The plaintiff went to the building to see one of the defendants on business, and entered at the easterly door, and being informed that the defendant was not then there, but might be in the shipping department, which was adjacent and on the west of the building, the plaintiff went out of the westerly door on to the sidewalk and thence to the place mentioned. Not finding the defendant there he proceeded to return to and into the building in which he first sought the defendant, and seeing a door partly open he entered there and stepped into the open elevator hatchway, the depth of which was about twelve feet. The door was between the easterly and westerly doors before mentioned of the building, and in going to it the plaintiff passed the westerly one. At the place where he then entered was a folding door. It was not the usual place of entry into the building, and that door was usually kept closed during the day, except when open for the purposes of access to the elevator from the street. In front of this door was one step from the walk, and the next was the threshold or saddle of the door-sill, and from the center of the latter to the elevator shaft was one foot and **seven**

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inches, and from the outer edge of the first step was less than three feet, so that after the plaintiff had stepped onto the door-sill his next step may have taken him into the shaft. When he approached the door he was going east. The east half of the folding door was partly open, and he pushed it open some further when he entered. There was no warning notice there. The folding door was of solid wood and of considerable height, and above it was a glass window. This was between twelve and one o'clock in the afternoon, and within the room it was light. If the plaintiff had stopped and looked about when he entered the door, he evidently could have seen the situation. Because he failed to do this it is contended that he was necessarily chargeable with contributory negligence. The plaintiff probably did not stop after he proceeded to enter. He says he supposed this was the main entrance of the building ; that the hatchway was not within his view when he went onto the step ; that as he entered he saw the saddle of the door-sill and floor, and supposed the latter was continuous ; that he then raised his eyes and glanced into the store-room and sales-room through a glass partition, and that, although it was light there, he saw no elevator shafting, and that the door obscured the hole, but exposed sufficient flooring to satisfy him that it was continuous. These are mainly the circumstances of the occurrence as represented by the evidence. It was the duty of the plaintiff, to exercise reasonable care, and to take observation of that which was apparent to view as he proceeded. But what is due care and diligence depends upon circumstances. The same precautionary means requisite to relieve a party from the charge of negligence when he approaches known places of danger, or places where danger may be apprehended, may not be required of him when he has no occasion to suppose that danger may be encountered. It cannot be said that the plaintiff upon this occasion was required to apprehend that there might be an exposed elevator pit in the place where he entered. The fact that the door was partly opened enabled him to suppose it was a suitable place of entry. So that the question is whether not seeing it was necessarily negligence on his part. That is not so,

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unless he was required to stop and take careful observation of the place when he entered upon the threshold and before he proceeded to further enter into the room. He says he looked, saw no hole, and one step took him into it. This question of contributory negligence may be considered in view of the influences which ordinarily control human action. That is to some extent governed by appearances, and is not always the consequence of failure to exercise the greatest prudence or to make use of the best judgment. Here the plaintiff in stepping into the room, the first step he took after his entry onto the threshold at a partially open door, received the injury from a cause which he had no apparent reason to expect and which he failed to see until too late to avoid the calamity. And the fact that the difference in time between his entrance into the room and his fall was only momentary, is a circumstance bearing upon his opportunity to see the danger and probably may have had some consideration upon the question of contributory negligence. The conclusion of the jury that he was free from that imputation was permitted by the evidence.

While it was not competent for the plaintiff to give evidence for the purpose of proving any changes about the premises made subsequently to the accident, the motion to strike out evidence on that subject was not error, because it was not received for such purpose, but was admitted solely to show, as claimed, that the drawings or diagrams of the premises presented by the defendants on the trial did not correctly represent the situation as it was at the time in question. There seems to have been no error in the rulings at the trial.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

CHARLES F. BERWIND et al., Appellants, *v.* THE GREENWICH INSURANCE COMPANY, Respondent.

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132 144
123 302

In an action upon a time policy of marine insurance upon a canal-boat, issued July 5, 1888, which expressly excepted "perils and losses from rottenness, inherent defects and other unseaworthiness," it appeared that the boat was repaired on August twenty-eighth, and was then in good seaworthy condition. There was no proof as to its condition after that time. It was employed in transporting coal. It left port loaded with coal on October nineteenth, and the next morning, in fair weather and smooth water, while being towed by a steam tug, suddenly sprung a leak and immediately sank. The boat was old and subjected to heavy strains, and one of plaintiffs' witnesses testified that it might be strained in loading or unloading, and that one heavy cargo might render it unseaworthy. *Held*, that plaintiffs were properly nonsuited; that it was at least incumbent upon them to show that the boat was seaworthy when she left upon her last trip.

It seems that, where it appears that a vessel, shortly after sailing, becomes leaky and sinks without encountering any peril or storm, this is presumptive evidence of unseaworthiness.

Reported below, 21 J. & S. 102.

(Argued April 17, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 4, 1886, which affirmed a judgment in favor of defendant, entered upon an order dismissing the complaint.

This action was upon a policy of marine insurance.

The material facts are stated in the opinion.

George Bethune Adams for appellants: Notice was proved as a matter of law, or, in any event, it became a question for the jury. (*Bennett v. L. C. M. Ins. Co.*, 67 N. Y. 274; *Griffey v. N. Y. C. F. Ins. Co.*, 100 id. 417.) The question of seaworthiness of the vessel was for the jury. (*Walsh v. W. Ins. Co.*, 32 N. Y. 431.) The presumption usually is in favor of seaworthiness, but where a vessel sinks without apparent cause and there is no proof of her seaworthiness, a presumption of unseaworthiness arises; but even that is a question for the jury. (*Guy v. Citizens' Mut. Ins. Co.*, 30 Fed. Rep. 695;

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Justice v. Lang, 52 N. Y. 328; *Pickup v. T. & M. M. Ins. Co.*, 4 Aspinwall's Maritime Cases, 43; 3 L. R., Q. B. Div. 594; 47 L. J., Q. B. Div. 749; 39 L. T. [N. S.] 341; 26 W. R. 689; 2 Arnould, 666, 667; McArthur on Contracts of Marine Insurance, 28; *Watson v. Clark*, 1 Dow. 366; Lowndes on Law of Marine Ins. 100, 101; *Anderson v. Morice*, L. R., 10 C. P. 58, 610; *Patrick v. Hallet*, 1 Johns. 241; *Borland v. M. M. Ins. Co.*, 46 Supr. Ct. 433; *Moses v. S. M. Ins. Co.*, 1 Duer, 159; *Van Wickle v. M., etc., Ins. Co.*, 2 N. Y. 350; 2 Arn. on Ins. 1345; *Wright v. O. M. Ins. Co.*, 6 Bosw. 269; *Moores v. Louisville Underwriters*, 14 Fed. Rep. 226-236; *The Vincennes*, 3 Ware, 175.) In a time policy, a warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk. (*Hathaway v. S. M. Ins. Co.*, 8 Bosw. 63; *Union Ins. Co. v. Smith*, 124 U. S. 427; *American Ins. Co. v. Ogden*, 20 Wend. 287; *Peters v. Phœnix Ins. Co.*, 3 S. & R. 25; *Paddock v. F. Ins. Co.*, 11 Pick. 227; *Starbuck v. N. E. M. Ins. Co.*, 19 id. 198; *Adderly v. A. M. Ins. Co.*, Taney's Dec. 126; *Copeland v. N. E. M. Ins. Co.*, 2 Met. 432; *Capen v. W. Ins. Co.*, 12 Cush. 517; *M. M. Ins. Co. v. Sweet*, 6 Wis. 670; *Hoxie v. P. M. Ins. Co.*, 7 Allen, 211; *Rouse v. Ins. Co.*, 3 Wall., Jr., 367; *Schloss v. Heriot*, Week. Rep. [1864, 1865] 596.) If a vessel be not heard of for so long a time after sailing that there remains no reasonable hope of her safety, she is presumed to have foundered at sea and the insurers are liable for the loss. (*Gordon v. Browne*, 2 Johns, 150; *Brown v. Neilson*, 1 Caines, 525; Lowndes on Marine Ins. 108; 1 Parsons on Marine Ins. 547.) It was not necessary that the plaintiffs should request that the facts be submitted to the jury. (*Stone v. Flower*, 47 N. Y. 566; *Frecking v. Rolland*, 53 id. 422; *Train v. Holland Co.*, 62 id. 598; *Clemence v. City of Auburn*, 66 id. 334; *Trustees, etc., v. Kirk*, 68 id. 459.) There having been an actual total loss, no abandonment was necessary, but if one was necessary, it was in time. (*Currie v. B. N. Ins. Co.*, L. R., 3 P. C. 72; Arnould on Marine Ins. 920.)

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Wilhelmus Mynderse for respondent. The plaintiffs are not aided by any supposed difference in the rule as to implied warranties of seaworthiness in respect to voyage policies as distinguished from time policies, because here the stipulation is express, and is a part of the contract of insurance. But even in respect to time policies the assured must keep the vessel seaworthy. (2 Parsons on Maritime Law, 147; *American Ins. Co. v. Ogden*, 20 Wend. 287, 296; *Capen v. W. Ins. Co.*, 12 Cush. 517.) The fact that the canal boat was sunk without any stress of weather, and without any apparent cause appearing in the plaintiffs' proofs, establishes her unseaworthiness. (*Van Winkle v. M. and T. Ins. Co.*, 48 Super. Ct. Rep. 95; 97 N. Y. 350; *Wright v. O. Ins. Co.*, 6 Bosw. 269; *Paddock v. F. Ins. Co.*, 11 Pick. 227, 235, 237; *Walsh v. W. Ins. Co.*, 32 N. Y. 436.) The complaint was properly dismissed on the ground of the failure of the plaintiffs to give prompt notice of the loss to the insurers, as required by the terms of the policy. (*Barwell v. R. Ins. Co.*, 48 Ind. 460; *Hovey v. A. M. Ins. Co.*, 2 Duer, 554.) The condition of the policy contained in the "labor and travel clause" required the plaintiffs to do all in their power for a recovery of the vessel. (*Beckwith v. Whalen*, 5 Lans. 576; *Spinner v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 153.) The failure of plaintiffs to give proof of any abandonment was a good ground for dismissal of the complaint. (*Beckwith v. Whalen*, 5 Lans. 576; *Spinner v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 153.)

BROWN, J. Upon the trial of this action the complaint was dismissed upon the grounds, first, that the proof failed to show the seaworthiness of the vessel at the time of the loss; and, second, that plaintiffs had failed to give to defendant prompt notice of the disaster. The action was upon a time policy issued by the defendant, whereby it insured the plaintiffs upon the canal boat "Eureka" for the term of one year from July 5, 1883. The particular perils issued against were of the "inland lakes, rivers, canals, and fires," excepting perils and losses

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arising from rottenness, inherent defects and other unseaworthiness." The evidence introduced by the plaintiffs showed that the boat was seaworthy at the inception of the policy. It further showed that it was repaired on July twenty-eighth and on August twenty-eighth, and at the latter date was in good order and in a seaworthy condition. That from the last named date it was employed in transporting coal from South Amboy to New York city carrying about two hundred and forty tons in a load and making a round trip between the points named about once a week. That it left South Amboy in the evening of October nineteenth loaded with coal, and about three o'clock on the morning of the following day, while being towed by a steam tug near Governors Island, in New York bay, suddenly and unaccountably sprung a leak and immediately sank. It was also proved that it was the captain's duty to report any defect in, or needed repairs to the boat to the plaintiffs' superintendent, and that none had been reported, and there was no proof as to her condition subsequent to August twenty-eighth. The captain was not called as a witness and no explanation was given for his absence from the trial.

In every case of marine insurance by a general policy covering all perils of the sea, where the vessel insured is in port, there is an implied warranty that the vessel is seaworthy at the inception of the policy. It is a condition precedent to the risk, and if the vessel is not seaworthy, the policy does not attach. In an action to recover for a loss upon such a policy, where the fact of seaworthiness at the time of issuing the policy is shown, it is immaterial what the vessel's condition is thereafter during the voyage, as loss from unseaworthiness is among the perils insured against.

The plaintiffs, under such a policy, make out a *prima facie* case by showing seaworthiness at the inception of the risk. But in time policies there is implied a warranty that the vessel will be kept in repair and made seaworthy at all times during the continuance of the risk, so far as that is reasonably possible, and this implied covenant imposes upon the insured the duty of active diligence to keep the vessel in good order

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and in a seaworthy condition. (2 Parsons on Maritime Law, 147, and cases cited in note on page 148, etc.) It is doubtless true that, under a general time policy insuring against all perils of the sea, unseaworthiness subsequent to the attaching of the policy is a defense, the burden of proving which is upon the defendant, and that the plaintiffs need offer no proof thereof as a part of their case, but in the policy in suit loss from unseaworthiness is among the excepted risks, and it was, therefore, incumbent upon the plaintiffs to show that the loss arose from some of the perils covered by the policy; and to make out their case some evidence was necessary from which the jury could infer that the sudden sinking of the boat was not due to defective structure or condition.

In determining whether the trial court properly disposed of the complaint on this ground, it is not necessary to go to the extent of the learned General Term and hold that the boat must be shown to be seaworthy when lost, but it certainly was necessary for plaintiffs to show that it was seaworthy when it left South Amboy on its last trip to New York. At that point the boat was without cargo, and full and ample opportunity existed, with very slight inspection, to ascertain whether her hull was tight and capable, with the cargo she was to take on board, to navigate the waters of New York bay. The question for the trial court to determine, therefore, was whether the jury would have been justified, from the evidence before it, in inferring that when the boat left South Amboy it was in a seaworthy condition. We think the evidence did not warrant such a conclusion. There was no evidence of her condition for two months prior to the disaster, and it affirmatively appeared that the boat was old and subjected to heavy strains, and one of the plaintiffs' witnesses testified that it might be strained in loading or unloading, and one heavy cargo might render it unseaworthy. It appeared that it sprang a leak suddenly, and sank in fair weather and smooth water. Under such facts no recovery can be had.

If it appears that the vessel, shortly after sailing, becomes leaky and unfit to perform her voyage, and sinks without

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encountering any peril or storm, this is presumptive evidence of unseaworthiness. (2 Arnould on Ins. 1345; *Van Wickle v. Mechanics and Traders' Ins. Co.*, 97 N. Y. 350; *Wright v. Orient Mutual Ins. Co.*, 6 Bosw. 269.)

The plaintiffs might have rebutted this presumption by showing the cause of the disaster, or, if that was impossible, by showing that the boat was in good condition before it was loaded at South Amboy, but having rested their case without proof of any kind on this point, the court properly held that there was no question for the jury, and that the presumption of unseaworthiness from the sudden sinking of the vessel was conclusive.

Our conclusion upon this branch of the case renders unnecessary any discussion of the question whether the condition of the policy requiring prompt notice of the disaster to be given to the defendant was complied with. The case was properly disposed of at the trial, and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

ABRAM SHAVER, Respondent, v. NELSON B. ELDRED,
Appellant.

Prior to 1838 a dam was built across the outlet of Owasco lake, which was used for hydraulic purposes by the proprietors. In 1857 an act was passed (Chap. 527, Laws of 1857) appropriating the dam for the use of the Erie canal, subject however to the use for hydraulic purposes by the owners of such dam at the time of such appropriation. The canal commissioners were authorized to increase the height of the dam, and to appropriate for the purpose the necessary lands, water rights, etc. In pursuance of a resolution of the canal board, flush gates were put upon the dam by the commissioner in charge, raising the water in the lake. In 1873 plaintiff presented a claim against the state for permanent damages to his adjoining lands, and an award was made to him therefor. Under an act of 1874 (Chap. 399, Laws of 1874), the dam was rebuilt of the same height as the old one, with flush gates two feet in height taken from the old dam and built into the new. In 1881 defendant, who was a director and the

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superintendent of a corporation, one of the proprietors of the dam at the time of its appropriation in 1857, acting under an authority in writing of the assistant superintendent of public works, given to him two years before, opened the gates of the dam and the water overflowed said lands of the plaintiff. Said assistant reported promptly to the superintendent the authority so given, and he had allowed it to remain in force. In an action to recover damages, *held*, that, assuming that the commissioners did not proceed in all things as required by statute, yet the legislature, in subsequently making appropriations and passing laws upon the subject, must be deemed to have acted with reference to what had been done by the canal authorities, and to have adopted and ratified their acts; and that, therefore, at the time in question, the state had the right to use the flush gates, and the remedy, if any, of any person whose property was injured by such act was by claim for compensation from the state; that the appointment of defendant to take charge of the gates must be deemed to have been ratified by the superintendent; also that defendant was not ineligible under the provision of the Revised Statutes (1 R. S. 250, § 185), which declares that no person owning any hydraulic works "dependent on the canals for their supply, or employed in or connected with such works, shall be employed as an agent upon the canals," as the said corporation was not dependent upon the canals, its right to the use of the water having been reserved by the act of 1857 (*supra*); that the subsequent action of the state must be presumed to have been subject to the original rights reserved; and that, therefore, the action was not maintainable.

(Argued April 18, 1889; decided May 8, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1886, which affirmed a judgment of the County Court of Cayuga county, in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This action was brought to recover for injuries to plaintiff's crops, caused, as he alleged, by the act of the defendant in raising a dam on the outlet of Owasco lake and thereby flooding his premises.

The county judge found that, on the 18th of March, 1881, the defendant was a director and the superintendent of a corporation known as the Auburn Water Works Company, and that on that day he applied to one of the assistant superin-

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tendents of public works for authority to close the gates of a dam across the outlet of Owasco lake when the water should lower sufficiently; that on the twenty-fifth of the same month said assistant superintendent consented, in writing, that the defendant should do so, and also, if it should become necessary, to temporarily open the gates; that the defendant, by closing said gates and keeping them closed during the spring and summer of 1883, caused the water of the lake to overflow certain lands in the possession of the plaintiff, whereby the crops and grass growing thereon were injured to the extent of \$150. The trial judge also found, as a conclusion of law, that the assistant superintendent had no authority to delegate discretionary power to the defendant or to appoint him as his agent to do said acts; that the same were done without lawful right or authority, and that the defendant was liable for all the injuries caused to the plaintiff thereby.

Charles M. Baker for appellant. If the Auburn Water-Works Company was not dependent upon the canals for its supply of water, the appointment or employment of defendant was valid. (*Wright v. Eldred*, 46 Hun, 12.) Even if it had been dependent upon the canals for a supply of water, and defendant being an officer of that company, ineligible for appointment to his position, still he was an employe or agent of the state, *de facto*, to do what he did with the flush gates, and as such agent or employe was entitled to protection even if his appointment or employment was invalid. (*Dolan v. Mayer*, 68 N. Y. 278; *Morrison v. Sayre*, 40 Hun, 467; *Wilcox v. Smith*, 5 Wend. 231; *Wood v. Peake*, 8 Johns. 69; *Newcomb v. Fellows*, 4 Denio, 437; *Waggoner v. Jermaine*, 7 Hill, 357.) Whether the appointment of defendant was valid or not, his acts were performed at the request of the canal officer who had the especial charge of the middle division of the canals, and they were performed in connection with the use and management of the canals. The state assumes liability for all damages arising from such acts. (*Sipple v. State*, 99 N. Y. 284; Laws 1870, chap. 321, § 1;

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Laws 1883, chap. 205, § 13; *Calkins v. Baldwin*, 4 Wend. 667; *Russell v. Mayor, etc.*, 2 Denio, 465; *Stevens v. Middlesex Canal*, 12 Mass. 465.) The criterion as to whether the defendant or the state is liable is not whether too much discretion was given to the defendant, but whether the state retained authority over him and could control his acts and direct him in their exercise, and could revoke his appointment and remove him. (*Brackett v. Lubke*, 4 Allen, 138; *Sadler v. Henlock*, 4 E. & B. 571; *Sproul v. Hemmingway*, 14 Pick. 1; *Sipple v. State*, 99 N. Y. 284.) The acts of the canal officers constituted an appropriation of the right to store water for canal purposes in Owasco lake by means of flush gates. Payment of compensation was not a condition precedent to acquiring that right, and was not necessary to constitute their acts an appropriation. (*Birdsall v. Cary*, 66 How. Pr. 358; *Turrill v. Norman*, 19 Barb. 263; *Ten Broeck v. Sherrill*, 71 N. Y. 279; Laws 1883, chap. 205, § 13.) An award where future damages may be demanded is supposed to cover and include all damages which might have been claimed. (*Furniss v. H. R. R. Co.*, 5 Sandf. 551.) An award of nothing has the same effect as an award and payment of a specified sum, and is compensation within the meaning of the Constitution and statutes. (*Rexford v. Knight*, 15 Barb. 627; *People v. Mayor of Brooklyn*, 4 N. Y. 419, 436; *Heacock v. State*, 105 id. 246.) The decision of any tribunal having jurisdiction to pass upon the questions submitted to it is as conclusive as the judgment of a court. (*Demorest v. Dargh*, 32 N. Y. 281; *Morewood v. Corp. of New York*, 6 How. Pr. 386; *Van Wormer v. Mayor of Albany*, 15 Wend. 262; *People ex rel. Peck v. Canal Board*, 29 Hun, 159.) If defendant was only an officer *de facto*, having no authority to open or keep open the flush gates, he cannot be held liable for an omission to act. (*Bentley v. Phelps*, 27 Barb. 524; *Olmstead v. Dennis*, 77 N. Y. 378.)

H. V. Howland for respondent. The assistant superintendent of public works had no pretense of authority to appoint

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any agent in regard to canal services. (Const. art. 5, § 3; *Lyman v. Jerome*, 29 Wend. 485; *St. Peter v. Dennison*, 58 N. Y. 416; 2 Kent's Com. 633, note b; Story on Agency, § 12.) Neither the superintendent of public works, nor any of his assistants or agents, had authority to place or keep the flush boards on this dam and thereby injure the property of the plaintiff. (*St. Peter v. Dennison*, 58 N. Y. 421; *Smith v. City of Rochester*, 92 id. 473; 1 R. S. 219, 220, §§ 9, 28; *Jackson v. Daly*, 5 Wend. 526; 2 R. S. [2d ed.] 458, § 27; *Green v. Miller*, 6 Johns. 39; *Parrot v. Knick. Ins. Co.*, 38 How. Pr. 508; 4 Mass. 522; 2 R. S. 555, § 27; *People ex rel. Mygatt v. Bd. of Suprs.*, 11 N. Y. 563; *Stewart v. Wallis*, 30 Barb. 344; *Hacker v. Worden*, 22 id. 400; *Varick v. Smith*, 5 Paige, 138.)

VANN, J. The defendant admits that he closed the gates of the dam upon the outlet of Owasco lake, but claims that, in so doing, he acted under the authority of the state, and that many years ago the state acquired the right to maintain the dam and to regulate the flow of water from the lake thereby. The rights of the state and the authority of the defendant to act for it are, therefore, the important questions presented by this appeal.

In addition to the facts found by the learned county judge, it appears that, prior to the year 1838, a dam was built across the outlet and that it was used for hydraulic purposes by the proprietors, who placed flush boards on the crest thereof to obstruct the flow of water from the lake. Since 1851 eleven different statutes have been passed by the legislature in relation to the improvement of said outlet, appropriating the dam, raising the height thereof, constructing a bulk-head for the purpose of storing water in the lake, and rebuilding and repairing the dam. (Laws of 1852, chap. 193, p. 264; Id. chap. 309, p. 454; Laws of 1853, chap. 175, p. 311; Laws of 1854, chap. 397, p. 1010; Laws of 1855, chap. 539, p. 1019; Laws of 1857, chap. 524, p. 107; Laws of 1858, chap. 328, p. 547; Laws of 1871, chap. 930, p. 2137; Id. chap. 778, p. 1787;

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Laws of 1872, chap. 583, p. 1424; Laws of 1874, chap. 399, p. 514.)

Action was taken by the state authorities for the purpose of accomplishing the objects specified in these statutes, but such action does not appear to have always been taken in the manner provided by law. What was done, however, seems to have been ratified by subsequent legislation appropriating various sums to complete the different improvements. The object of the earlier statutes was to increase the supply of water for power to be used at the Auburn state prison. The first act connecting Owasco lake with the Erie canal was passed in 1857 (chap. 524, p. 107), when the canal commissioners were authorized to appropriate this dam to the state "with right to increase the height of said dam, or otherwise raise the water above the same, to such height as" the canal commissioners should establish, "and the right to draw water therefrom under such regulations as may from time to time be established" by said commissioners; "and also to appropriate, for the purpose aforesaid, such lands, water, water rights and privileges as the said commissioners may deem necessary to effectuate and complete said improvement." The canal appraisers were authorized and required to award to the persons whose property was taken, "and also to the owner or owners of any lands which may be injured by raising the water in such lake or outlet by reason of such dam, such sum or sums as they" should deem them equitably entitled to receive as compensation. The act also contained an appropriation for the payment of the awards. The next year an appropriation was made for the improvement of Owasco lake outlet to cover deficiency. (Laws of 1858, chap. 328, p. 547.) In June, 1868, the canal board adopted and approved a recommendation made by the division engineer of the Erie canal "to raise the water one and a half feet above the crest of the dam, by means of placing flush boards thereon."

In 1871, the canal commissioner in charge of the middle division, to which Owasco lake and its outlet belonged,

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reported to the legislature that the supply of water from said lake to the Port Byron level of the Erie canal was liable to fail during low water, but that more water could be obtained by raising said dam and converting the lake into a reservoir. He also reported that he had ordered a survey and estimate to be made in order to raise the water in the lake two and one-half feet higher. The legislature, thereupon, made an appropriation "for the construction of a bulk-head or other adequate structure in or upon the outlet of the Owasco lake for the purpose of storing water in the Owasco lake for canal purposes, said sum * * * to be expended by and under the direction of the canal commissioner in charge of the middle division of the Erie canal." (Laws of 1871, chap. 930, p. 2137.)

In 1872 a further appropriation was made for the purpose of improving the feeder at and above the dam now used by the Auburn Water-Works Company. (Laws of 1872, chap. 583, p. 1424.) At about this time flush gates were put upon the dam by the commissioner in charge, and, in 1873, the plaintiff presented a claim to the canal appraisers for damages from the overflow of water upon the identical land involved in this action. He stated in his petition that, in April, 1872, the canal commissioner, by the use of flush boards, raised the water of the lake about four or five feet above its natural level, and that as the structure and overflow were to be permanent, his damages amounted to the sum of \$4,000. The claim was heard and an award made.

By chapter 399, Laws of 1874, a certain sum was appropriated "to pay for work done and now due in repairing stone dam at Owasco lake in the summer of 1873," and a further sum "for rebuilding the upper dam on the Owasco outlet, * * * to be expended under the direction of the commissioner in charge of the middle division." A map, plan and estimate for rebuilding the dam, after approval by the state engineer, was adopted by the canal board, and the dam was rebuilt accordingly. The plan provided for flush gates two feet in height; and in executing the plan the new dam was built of the same height as the old one, and the flush gates were taken

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from the old dam and built into the new one. These gates are still in use and were the cause of the overflow by which the plaintiff's crops were injured.

Assuming that the commissioners did not, at all times, proceed in all things as required by the Revised Statutes (1 R. S. 221, § 17), the legislature, in subsequently making appropriations and passing laws upon the subject, is deemed to have acted with reference to what had been done by the canal authorities. (*Brown v. Mayor, etc.*, 63 N. Y. 239, 244, 245; *Nelson v. Mayor, etc.*, Id. 535, 546.) Under the circumstances of this case the legislature is presumed to have had knowledge of the facts directly involved in its acts, and to have adopted what had been done, by visible and permanent structures, towards appropriating the waters of Owasco lake. When it made an appropriation for rebuilding the old dam, and directed that the amount should be expended by the commissioner in charge, it sanctioned the construction of a new dam at the same height as the old one, even if the canal officers had raised the latter to a height not strictly authorized, owing to their failure to comply with certain preliminaries required by statute.

We think, therefore, that, at the time of the alleged trespass, the state had the right to use the flush gates in question, and that the remedy of individuals, whose property was injured by such use, was to seek compensation from the state in the usual way. (*Wright v. Eldred*, 46 Hun, 12.)

It is, however, contended that the defendant had no authority to act for the state, because an assistant superintendent of public works could not appoint an agent with discretionary power to raise and lower the flush gates when he saw fit. The appointment was promptly reported by the assistant to the superintendent of public works, who had allowed it to remain in force for two years, at the time of the acts in question. It, therefore, must be regarded as the appointment of the superintendent himself, as a ratification of the act of his assistant may be presumed from the circumstances. But it is claimed that the defendant, owing to his connection with the Auburn Water-Works Company, was ineligible under the Revised

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Statutes, which provide that no person owning any hydraulic works dependent upon the canals for their supply, or who shall be employed in or connected with any such works, shall be employed as superintendent, lock-keeper, collector of tolls, weighmaster, or other agent upon the canals. (1 R. S. 777, § 185 [8th ed.].) The application of the statute to this case is questioned upon the ground that the rights of the state are, by its own enactment in appropriating the waters of the lake, subject to those of the owners of the dam, including the Auburn Water-Works Company. (Laws of 1857, chap. 524, p. 107.) By this act the canal commissioners were authorized to appropriate, among other things, the dam in question, but the right was made expressly "subject * * * to the use for hydraulic purposes, by the owners of such dam, at the time of such appropriation, their heirs and assigns, of the water of said outlet, as the same shall, from time to time be drawn from said dam." The learned General Term apparently overlooked said statute in deciding this case, but subsequently, in deciding another action brought against the same defendant to recover for injuries caused by lowering the flush gates upon said dam, the statute was recognized and due effect given to it by a judgment in his favor, (*Wright v. Eldred, supra.*)

The water-works company was not dependent upon the canal for its supply of water, because the state appropriated the dam subject to the right of the company to use the water for hydraulic purposes. (Laws 1857, chap. 524, § 1.) Appropriation, subject to an existing right, leaves that right unaffected by the exercise of the power of eminent domain. As the water right of the company was not acquired by the state, it did not become a part of the canal. The company, therefore, was not dependent upon the canal for its supply of water, but was independent of it. The action of the state in increasing the storage capacity of the dam, after its first act of appropriation in 1857, is presumed to have been in harmony with it, and, therefore, subject to the original water right of the company, because the new dam was not to be built until the "owners of water-powers below" had con-

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tributed \$3,000 towards the project. (Laws 1874, chap. 399, p. 514.)

The conclusion of law of the trial judge, which was duly excepted to, was, therefore, erroneous and the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Judgment reversed.

THE PEOPLE ex rel. JOHN NUGENT, Respondent, v. THE BOARD OF POLICE COMMISSIONERS, etc., Appellant.

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The relator, a patrolman of the police force of the city of New York, was arrested by his superior officer on June 18, 1879, on a charge of felony, and was imprisoned until January 17, 1880, when he was acquitted on trial. On that day he reported for duty. On January twenty-four he was dismissed from the force. In proceedings by *mandamus* to compel payment of his salary from the time of his arrest to that of his dismissal, defendant claimed that under the provision of the act of 1878, supplemental to the city charter of that year (§ 5, chap. 755, Laws of 1878), which provides that "any member of the police force who shall be absent from duty without leave for the term of five days shall * * * cease to be a member of the police force," the relator's title to the office ceased on June eighteenth. *Held* (FOLLETT, Ch. J., BROWN and HAIGHT, JJ., dissenting), untenable; that an enforced absence, caused by an unjustifiable arrest and detention, as was the case here, was not within the intent of the statute.

The authorities bearing upon the subject collated.

The trial court gave a money judgment against the defendant. *Held*, error.

(Argued March 11, 1889; decided May 3, 1889.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 2, 1887, which directed and affirmed a money judgment entered upon trial at Circuit of issues presented by a return to an alternative writ of *mandamus*, and which directed the issuing of a peremptory writ of *mandamus* commanding defendant to pay to the relator the amount of said judgment.

The facts are sufficiently stated in the opinion.

Opinion of the Court, per PARKER, J.

David J. Dean for appellant. The admitted absence of the relator from duty without leave terminated his membership of the police force on June 18, 1879. (Laws of 1873, chap. 755, p. 1120, § 5.) Absence from duty without leave, whether voluntary or involuntary, under the statute, terminates membership. (Laws of 1882, chap. 410, § 385.)

Albert Hessberg for respondent. The relator's salary belongs to him as an incident of his office, and so long as he holds it; and, when improperly withheld, he may sue for and recover it. When he does so he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office. (*Fitzsimmons v. City of Brooklyn*, 102 N. Y. 526.) The relator being a patrolman was an officer of the police force of the city of New York, and the salary referred to in the city charter of 1873 (Laws of 1873, chap. 335, § 43) is incidental to the office, to which, by reason of his title to the office, the incumbent acquired a right. (*People ex rel. Ryan v. French*, 91 N. Y. 265; *Nichols v. McLean*, 101 id. 537; *McVeany v. Mayor*, etc., 80 id. 185; *Dolan v. Mayor*, etc., 68 id. 274.)

PARKER, J. The relator, a patrolman of the police force of the city of New York, was, on the 13th day of June, 1879, arrested by his superior officer, Captain Byrnes, of the police department, and taken to a Police Court and there committed to the tombs, where he remained until the 17th day of January, 1880, on which day, after a trial under an indictment charging him with the commission of a felony, he was acquitted.

On the same day he reported for duty. Subsequently, and on the twenty-fourth day of January, he was tried before the board of police commissioners and dismissed from the force. Nugent thereupon demanded payment of his salary as patrolman, from the date of his arrest to the time of the making of the order dismissing him from the service, and the board of police commissioners refusing to comply with such demand, proceedings were instituted to compel payment, which have resulted in the issuance of a writ of *mandamus*, by the Gen-

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oral Term of the Supreme Court, directing payment to be made. In *Fitzsimmons v. City of Brooklyn* (102 N. Y. 536) the court lays down the rule that the salary of a patrolman "belongs to him as an incident of his office, and so long as he holds it." Whether or not he rendered any service during the time for which he claims compensation is unimportant. The sole question to be considered is, did the relator have title to the office of patrolman during the period for which he claims, or did he not? If he had title, he was entitled to his salary, otherwise not.

Article 7 of chapter 335 of the Laws of 1873, relates generally to the organization and discipline of the police force.

By section 41 of such article the board of police are empowered to prescribe the government and discipline of the department, and to hear charges which have been preferred against members.

Section 47 provides, among other things, that "unexplained absence, without leave, of any member of the police force for five days, shall be deemed and held to be a resignation of such member, and accepted as such." While section 55 empowers the board of police, in its discretion, on conviction of a member of the force of any legal offense or neglect of duty, * * * or absence without leave, to punish the offending party.

The board of police, therefore, were invested with the authority to determine when absence without leave was explained and when not explained. They could arbitrarily accept as an explanation any excuse, however frivolous, which the ingenuity of favorite members of the force might suggest. If held to be explained, it was still an absence without leave, and on conviction the offending party could be punished by reprimand, forfeiting pay for a specified time or dismissal from the force. The power to determine which of the methods of punishment authorized should be inflicted rested solely in the discretion of the board of police. This discretion the legislature subsequently saw fit to and did take away from the board of police by chapter 755 of the Laws of 1873, entitled "An act supplemental to the act entitled an act to reorganize

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the local government of the city of New York, passed April 30, 1873." Section 5 of that act reads as follows: "Any member of the police force who shall be absent from duty without leave for the term of five days shall, at the expiration of said five days, cease to be a member of the police force."

The appellant contends that, under and by virtue of this section of the statute, the relator's title to the office ceased on the eighteenth. He was arrested on the thirteenth day of June, and it not appearing that leave of absence was granted, his term of office must be deemed to have ceased, as contended for by the appellant, unless his enforced absence under the command of the law shall be held not to be within the intentment of the statute. It is both unreasonable and unjust to the citizen to hold that in any case he is subject to a penalty imposed by law for non-performance of a duty when such performance, without fault on his own part, is prevented by law. It is far more agreeable to reason to construe such a statute as containing an implied undertaking on the part of the state that performance shall not be hindered or prevented by any legal authority within the limits of the state, and, as a necessary consequence, that when thus hindered and prevented the statute shall not operate as against the citizen or officer thwarted in the attempt at performance. The principle which justifies and demands such a construction of this statute, as will relieve the relator from the penalty of enforced non-performance, by the act of the law, is sanctioned by elementary writers and in adjudged cases. "When performance of a condition is prevented by the act of God or law, it is excused." (Coke on Litt. 20, 6 a; 3 Kent's Com. 471; 8 Bing. 231; Gilbert on Covenants, 472; 1 Parsons on Contracts, 524; Chitty on Contracts, 631.)

In the *People v. Bartlett* (3 Hill, 570) the defendant pleaded, in substance, that after entering into a recognizance for the appearance of a prisoner, such prisoner was arrested and committed to jail in another county, and there kept in confinement until convicted and sent to state prison. The plea was held to be a good answer to the action, the court, in the opinion,

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saying: "It is a general principle of law that where the performance of the conditions of a bond or recognizance has been rendered impossible by the act of God or of the law, * * * the default is excused." This case has been cited with approval in a long line of cases in the several courts of this state.

In the case of the *Commonwealth v. Terry* (2 Duvall, 383), it was held that, in a proceeding against the surety upon a forfeited recognizance, it was a sufficient defense that the defendant, being a soldier in the Federal army, was refused a furlough, and by reason thereof was unable to appear in discharge of the recognizance. In the case of the *Commonwealth v. Webster* (1 Bush. 616), it was held that the defendant, having been arrested by a provost marshal and taken from the county where the prosecution against him was pending, the bail should not be made liable because he was deprived of the power to surrender the defendant by the United States officer. In *Commonwealth v. Overby* (80 Ky. 208) it was held that "although the bail was not deprived of his right to surrender the defendant, by the commonwealth, he was effectually prevented exercising that right by the United States government, and, in our opinion, it does not make any difference whether the non-appearance of the defendant, in compliance with the bail bond, be caused by the commonwealth or the United States government, for the authority of neither can be resisted. In *People v. Cook* (30 How. Pr. 110) the obligee, in a recognizance, enlisted as a soldier under a call of the president for troops and was unable to appear, the bond was declared forfeited, and judgment recovered against the surety. The judgment was reversed, the court, in the opinion, saying: "The officers of the state, acting under its authority, are thus shown by the answer to have detained the principal in the recognizance and prevented the performance of its conditions by the bail." The cases so far cited establish the doctrine that the People cannot recover on a bail bond, because of a forfeiture caused by the act of government or the authority of law.

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In *Wolfe v. Howes* (20 N. Y. 197) the question under consideration was, whether an employe who had failed to complete his contract could recover on showing that failure to perform was not a voluntary act, and the court said: "The law gives a reasonable construction to all contracts. For instance, in the present case, did the parties intend that the contract should be binding on the plaintiff's testator in case of unavoidable sickness or death? Or did they intend, and is it to be implied, that each should perform according to the contract, *Deo volente?*"

In *Cohen v. New York Mutual Life Insurance Company* (50 N. Y. 610), plaintiff, by the occurrence of war between the states, was prevented from transmitting money for the payment of premiums due upon a policy of life insurance. At the close of the war she tendered the amount due for premiums, with the interest thereon, which the defendant refused to receive, claiming that the policies had become forfeited by non-payment. The court held that the contract was not dissolved, but suspended by the war, and, in the opinion, said: "There is a manifest distinction between mere impediments and difficulties in the way of the performance of a condition and an impossibility created by law or the act of the government." (*Wood v. Edwards*, 19 Johns. 205; *People v. Bartlett*, 3 Hill, 570; *Wolfe v. Howes*, 20 N. Y. 197.)

The cases referred to establish the principle that, in matters of contract, a party may be relieved from the consequences of the obligation to perform when performance is prevented by the act of God, or the exercise of a superior power residing within the sovereignty of the state. The same principle has been held to relieve a party from the obligation imposed by statute.

In *Wilckens v. Willet* (1 Keyes, 521), a person admitted to the liberties of the jail was taken, by a warrant of the speaker of the house of representatives, without the state to show cause why he should not be punished for contempt. The judgment-creditor brought an action against the sheriff for an escape. The statute (2 R. S. 437, § 36) provided "that if any prisoner * * * shall go, or be at large without the boundaries of the liberties

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of such jail, without the assent of the party at whose suit such prisoner was committed, the same shall be an escape of such prisoner, and the sheriff shall be answerable, therefore, for such debt," etc. In that case, as in this, the statute contained, in terms, no exception whatever. The statute under consideration provides that absence "from duty without leave for five days" forfeits the office. In the case cited, the statute provided that going or being at large without the boundaries of the liberties of the jail "shall be deemed an escape," and the sheriff shall be liable, and the court held that it was not an escape, because, while he was actually without the jail liberties, he was so without authority of law.

Upon the same principle it has been determined that taking a prisoner away from the jail liberties on a *habeas corpus ad testificandum* does not constitute an escape. (*Noble v. Smith*, 5 Johns. 357; *Hassam v. Griffin*, 18 Johns. 48; *Wattles v. Marsh*, 5 Cowen, 176; *Martin v. Wood*, 7 Wend. 132.) The relator was arrested by his superior officer upon a charge which the courts have determined to be unfounded, and thus precluded from discharging the duty which his office devolved upon him, and it would be a perversion of justice if the wrongful act of his superior officer should result in the forfeiture of his office.

We think that the principle deducible from the cases cited demands the holding that the unjustifiable arrest and detention of the relator (for unjustifiable such detention must be held to be upon the verdict of the jury), did not operate to divest him of his title to the office of patrolman. That his absence was in obedience to the command of the law, and not, therefore, within the intendment of the statute. It follows that the relator was entitled to his salary for the period claimed, and the defendant having refused to pay, *mandamus* was the proper remedy. The trial court erred in granting a money judgment against the defendant, and so much of the order of the General Term as affirms such judgment should be reversed. The order of the General Term and the writ of *mandamus*

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issued thereon should be further modified by striking out the allowance for costs of the appeal to the General Term.

As thus modified, the order of the General Term should be affirmed, without costs of this appeal.

BROWN, J. (dissenting). I dissent from the conclusion of the court in this case. The defense to the relator's claim for salary is that, by reason of absence from duty without leave for the term of five days, he had, from the nineteenth day of June, ceased to be a member of the police force of the city.

The section of the statute upon which this defense rests is as follows: "Any member of the police force who shall be absent from duty without leave for the term of five days, shall, at the expiration of said five days, cease to be a member of the police force." This provision is contained in chapter 755, Laws of 1873, section 5, which is entitled "An act supplemental to the act entitled 'An act to reorganize the local government of the city of New York,' passed April 30, 1873." This statute relates wholly to the police force of the city, and is supplemental to article 7 of chapter 335 of the Laws of 1873. Article 7 relates generally to the organization and discipline of the police force, and, among other things, provides for a board of commissioners, to be known as police commissioners, who shall appoint the police force. It then provides, section 41, "that the government and discipline of the police department shall be such as the board may prescribe, but members of the police force shall be removable only after written charges shall have been preferred against them, and after the charges have been publicly examined into, upon such reasonable notice to the person charged, and in such manner of examination as the rules and regulations of the board of police may prescribe."

Section 47. "No member of the police force, under penalty of forfeiting the salary or pay which may be due to him, shall withdraw or resign, except by permission of the board of police. *Unexplained absence without leave of any member of the police force for five days shall be deemed and held to be a resignation of such member and accepted as such.*"

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Section 55. "The board of police shall have power, in its discretion, on conviction of a member of the force of any legal offense or neglect of duty * * * or *absence without leave*, * * * to punish the offending party by reprimand, forfeiting pay for a specified time * * * or *dismissal from the force*."

Thus stood the law on the subject under consideration from April 30, 1873, until the enactment of the supplemental law on June thirteenth of the same year. *Absence from duty, without leave*, for any period of time, was an offense for which the offender might be tried, and upon conviction punished by reprimand, fine or dismissal from the force, and *unexplained absence without leave for five days*, was to be deemed a resignation and accepted as such. The latter offense was made a more severe one than the former, and was visited with a more severe penalty.

Section 5 of the supplemental act must be read in connection with these provisions. The several sections quoted are *in pari materia*, and the legislature intended to supplement the old law by the new provision. But if this provision is to be construed as relating to a voluntary absence only, and not to an involuntary or enforced absence, it will be found that the new provision is mere susplusage and adds nothing to the old law. Clearly, under the first act, no member of the force, if absent for a period less than five days, could be removed except after trial and judgment of the board, and in case of absence for a period of five days or more, whether or not such absence should be deemed and held to be a resignation, would depend on the explanation of the absentee to his superior officer. This would involve examination and evidence, and the determination of the fact as to whether the explanation was sufficient and satisfactory, and would, therefore, necessitate a trial and judgment.

It thus appears, I think, that under the principle act no member of the force could be removed except after trial, and this involved the preferment of charges and reasonable notice thereof to the accused and a public examination. If, now,

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section 5 of the supplemental act is to be construed to refer to voluntary absence only, what has been added to the prior law or of what force is the later enactment? Involuntary absence is explainable absence, but this offense is covered by the first act, and those guilty of it may, under its provision, be removed from the force. This construction must, therefore, be rejected as giving no effect to the manifest intention of the legislature to alter the first law.

That the legislature intended to add something to the law is obvious, and I think they have expressed their intention so clearly that the meaning is plain.

Under the first act, as I have shown, there would necessarily be dismissal by the slow process of preferment of charges and trial, but, intending to remove the necessity of a trial and make absence for the period stated, itself work a dissolution of membership of the force, it was enacted in plain and unambiguous language that a member of the force who should be absent for five days without leave "*at the expiration of said five days should cease to be a member of the police force.*" No written charges or trial or conviction by the police board is made necessary to accomplish that result, but at the end of the fifth day of absence the absentee ceases, *ipso facto*, to be a member of the force. Absence works its own penalty, and the law executes itself. No other construction will harmonize the two acts and give effect to all the provisions on this subject. The omission in the supplemental act of the word "*unexplained*," and the provision that the absentee should at the expiration of five days "*cease to be a member of the force*" in place of that contained in the principal act, *that absence should be held to be a resignation of such absentee*, indicates clearly to my mind, the intention of the legislature to make "absence" of itself work a dissolution of membership in the force. Section 5 of the supplemental act is plainly a substitute for the provision relating to unexplained absence in section 44 of the principal act. The two provisions cannot stand together and the later must prevail.

This view of the law has further confirmation by section 273,

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chapter 410, Laws of 1882, known as the consolidation act, where it appears that the legislature have, to a limited extent, restored the provisions of the first law of 1873, and provided that "*unexplained absence * * ** for five days shall be deemed and held to be a resignation, and the member *so absent shall at the expiration of said period cease to be a member of the police force.*" Whether under this provision an absentee would be entitled to a trial or whether the law executes itself is not now necessary to be determined.

Public policy also dictates that this construction should be placed upon the law. The police force of the city is a semi-military organization. Its efficiency can be maintained only by discipline of the strictest character. The numbers of the force and the power to increase it is limited. It watches over a large territory and the maintenance of order throughout the city demands from each member his presence at his post. Absence from duty without leave would be an offense which, more than all others, would impair its efficiency. Mindful, doubtless, of the necessity of strict discipline among its members, the legislature has seen fit to prescribe that absence for a given period without leave shall forfeit the absentee's position on the force. This rule is the law of the police officer's being, under which he enlists. The state has said to him, in substance, if you are absent from your post at any time for five days, you cease to be an officer at the expiration of that period. No matter what reason may exist, the fact of absence removes you from the force. And is not this rule, in view of the constant vigilance necessary to protect the property and inhabitants of the chief city of the nation, a reasonable and proper one? Suppose sickness should break out among the officers of the force disabling many from the performance of their duty, and some emergency should arise requiring the service of all the members of the force, would not the police commissioners have the right to say to the sick, we will not give you leave of absence, the public interests will not permit, we must have your service or fill your place with others? I think such power should exist. In other words,

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that the police board should have power at any moment to increase the force to the limit allowed by law, but under any other construction of the statute under consideration many officers might be absent from duty, from causes over which they had no control, and the city be compelled to do without their service and the police board be powerless to supply their places.

The board, under section 3, chapter 755, Laws of 1873, have power, by a unanimous vote, to restore a member who has been dismissed from the force, and under this provision no substantial hardship can befall any member under the construction I have given the law.

I think the judgment should be reversed, and the proceedings dismissed, with costs.

POTTER, BRADLEY and VANN, JJ., concur with PARKER, J.; FOLLETT, Ch. J., and HAIGHT, J., concur with BROWN, J., dissenting.

Order modified as directed in the prevailing opinion, and affirmed as modified.

HENRY PEARCE et al., Respondents, v. MARY E. MOORE,
Appellant.

Plaintiffs, for several years prior to 1869, had occupied certain real estate as lessees under P; in that year they acquired P.'s title. P. claimed under two deeds from the comptroller of the state, dated February 14, 1862, and December 12, 1868, given upon sales of the land for taxes, and which purported to convey an absolute estate in fee simple. Plaintiffs continued in possession of this land until the commencement of this action in 1883, which was brought to compel the determination of a claim made by defendant to said real estate adverse to plaintiff's title. The answer denied plaintiffs' title and possession and alleged title in defendant. Defendant claimed under a deed to him, dated October 27, 1881, executed by one S., whose grantor C. held title to the property from November 14, 1854. Held, that, as at the time of the execution of the deed to defendant the land was in the possession of a person claiming under a title adverse to defendant's, his deed was void (1 R. S. 782, § 147), and, as against him, plaintiff was entitled to possession without regard

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to the question as to the validity of the comptroller's deeds; that if there were such defects in the proceedings to sell the land for taxes as to render those deeds void, the title to the land was still in C., defendant's remote grantor, and upon that title must be founded all proceedings to recover possession from the plaintiffs.

Chamberlain v. Taylor (92 N. Y. 348) distinguished.

(Submitted April 15, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, made April 20, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court, and which affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

Adelbert Moot for appellant. Plaintiffs had no title, while defendant had title, and, therefore, the direction of the verdict in plaintiffs' favor was error. (*Becker v. Holdridge*, 47 How. Pr. 429, 430; *Hand v. Ballou*, 12 N. Y. 541, 551; *Chamberlain v. Taylor*, 26 Hun, 601.) As defendant could successfully maintain ejectment against plaintiffs, by bringing such an action in the name of defendant's grantors (under section 1501 of the Code of Civil Procedure), defendant does not unjustly claim title in this action, and the court erred in directing a verdict against defendant, and a new trial should be granted. (*Chamberlain v. Taylor*, 92 N. Y. 348; Code Civ. Pro. §§ 1642, 1644; *Ford v. Belmont*, 35 N. Y. Supr. Ct. 135; *Sharp v. Spier*, 4 Hill, 76; *Jackson v. Estey*, 7 Wend. 148; *Marshall v. Powell*, 6 Wheat. 119; *Brennen v. Eastman*, 50 Barb. 639; *Hoyt v. Dillon*, 19 id. 649; *Thompson v. Burnhams*, 61 N. Y. 65; *Hilton v. Bender*, 69 id. 75; Cooley on Taxation, 324; Burroughs on Taxation, 332, § 119; *Whitney v. Thomas*, 23 N. Y. 281; *N. Y. & H. R. R. Co. v. Lyon*, 16 Barb. 651.) Plaintiffs' title is so void that an action to cancel it as a cloud on title could not be maintained if the defects set forth appeared by record. (*Stuart v. Palmer*, 74 N. Y. 183; *Wells v. Buffalo*, 80 id. 253.)

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J. A. Ronayne for respondents. The language and meaning of the Code are not to determine plaintiffs' title, but the defendant's claim; and the defendant, who would change the possession, must make out a title, upon the strength of which she must recover, if at all. (Code Civ. Pro. § 1638; *Barnard v. Simms*, 42 Barb. 304; *Hager v. Hager*, 38 id. 96; Tyler on *Eject.* 72, 725.) As to title defendant is the actor; she must show that her title is one of the three named in the Code, and that it is better than that of the plaintiffs. (*Barnard v. Simms*, 42 Barb. 304.) The conveyances to plaintiffs' grantors, executed by the comptroller, were presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular, etc. (2 R. S. [7th ed.] 1028, § 65; *Finlay v. Cook*, 54 Barb. 30; *Colman v. Shattuck*, 62 N. Y. 351; *Hand v. Ballou*, 12 id. 541.) If either of the tax titles of the plaintiffs' grantor, Augustus Paul, were defective on account of informality in any of the proceedings prior or subsequent to the tax sales, such defect was cured by twenty years' adverse possession under claim of title in fee by Augustus Paul and his grantees, the plaintiffs. (*Finlay v. Cook*, 54 Barb. 11; *Sands v. Hughes*, 53 N. Y. 287.)

BROWN, J. This action was brought to compel the determination of a claim made by the defendant to real estate in the city of Buffalo which was adverse to the title of the plaintiff.

The complaint contains appropriate allegations to bring the case within the provisions of the Code of Civil Procedure on this subject. It alleged seizen in the plaintiff and actual possession of the property in question for upwards of three years next previous to the commencement of the action. (Code, §§ 1638, 1639.) The answer denied the plaintiffs' title and possession, and alleged title in the defendant. There is no dispute upon the facts developed on the trial.

It appeared that the plaintiffs had been in possession of the

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land since January, 1869. In that month they took from Augustus Paul a quit-claim deed for the property. Paul claimed title under two deeds from the comptroller of the state, dated, respectively, February 14, 1862, and December 12, 1868, given upon sales of the land for taxes, and which purported to convey an absolute estate in fee simple to the land. (1 R. S. [5th ed.] pt. 1, chap. 13, § 99.) Under these deeds plaintiffs had continued in possession until the commencement of the action. The defendant traced a perfect paper title to the land back to the people of the state. The deed to herself, however, bore date October 27, 1881, and, presumably, was delivered on that day, and was executed by one Hiram Sherwood. Sherwood's grantor was Nathaniel Case, who appears to have held the title to the property from November 14, 1854. At the close of the evidence the court directed a verdict for the plaintiffs, and judgment having been entered and affirmed by the General Term, the defendant has appealed to this court.

The deed to the defendant was void. The statute provides that "every grant of land shall be absolutely void if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor." (1 R. S. [2d ed.] 732, § 147.)

There was no dispute as to plaintiffs' possession of the land. They had occupied it as lessees under Paul for several years prior to 1869, and in that year they acquired Paul's title, and under that title they claimed to be the owners, and there was no claim made on the trial, as there could be none, that such title was not adverse to the title of Case and Sherwood, who were defendant's grantors. It was wholly immaterial, therefore, whether the comptroller's deeds to Paul were valid or void. As against the defendant the plaintiffs were entitled to the possession of the land, and as against plaintiffs' defendant's deed was void and the proof failed to establish a title in her.

There is nothing in the case of *Chamberlain v. Taylor* (92 N. Y. 348), cited by defendant, to support her contention that she established a title to the property. That was an action of

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ejectment brought by the plaintiffs for the benefit of their grantee. Such an action is maintained, not on the grantee's title, for he has none, but proceeds on the theory that the deed to the grantee is void, and the grantor's title is neither extinguished or transferred, but remains valid and effectual. As was pointed out in that case, the action is not founded upon the illegal deeds, but in disaffirmance of it.

In *Livingston v. Proseus* (2 Hill, 528), the rule applicable to deeds of this character is stated as follows: "As against the person holding adversely the deed is utterly void, a mere nullity. There was an attempt to convey, but the parties failed to accomplish the object. The title still remains in the original proprietor, and he must sue to recover the land." The defendant's deed was absolutely void, and if, as it is claimed, there were such defects in the proceedings to sell the land for taxes as to render void the comptroller's deed to Paul, the title to the land was still in the defendant's remote grantor, and upon that title must be founded all proceedings to recover possession of the land from the plaintiffs.

The judgment was right and should be affirmed, with costs.

All concur.

Judgment affirmed.

FERGUS DODDS, Appellant, v. MARIA SMITH HAKES,
Respondent.

114	260
137	297
114	360
130	436

The power of arbitrators is confined strictly to the matters submitted to them, and if they exceed that limit, the award will, in general, be void. It may be shown by oral evidence, in defense against or avoidance of an award, that the arbitrators acted in excess of their jurisdiction.

Defendant leased to plaintiff a store, but was unable to give possession. Plaintiff claimed damages, and it was submitted to arbitrators to determine "what the damages should be." In an action upon the award it appeared the arbitrators allowed a gross sum, basing their award upon the value of the lease and the fact that plaintiff had been thrown out of business. *Held*, that the submission did not authorize any allowance for the loss of business plaintiff might have sustained from being deprived of the opportunity to occupy the store; and that, as the void part of the

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award could not be separated from that which was within the jurisdiction of the arbitrators, the whole was void.

Where damages are claimed solely because of the failure of a lessor to give the lessee possession of the demised premises, its measure is the excess of the rental value over the rent reserved in the lease.

(Argued April 19, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made June 30, 1886, which affirmed a judgment of the County Court of Rensselaer county, entered upon an order nonsuiting plaintiff on trial.

The nature of the action and the material facts are stated in the opinion.

James E. Freier for appellant. Where award and submission are unambiguous you cannot go behind the face of the submission or award to attack it. (*Cobb v. D. Mfg. Co.*, 108 N. Y. 468; *Doke v. James*, 4 id. 568.) Damages from breaking up Dodds' business and losing a good place for his business, were properly not allowed. (*In re Badger*, 2 B. & Ald. 691; *Emmett v. Hoyt*, 17 Wend. 410; *Cobb v. D. Mfg. Co.*, 108 N. Y. 463, 467.) The arbitrators were selected as plumbers (as experts) to determine upon this very question of special damage and to do so by their special knowledge. (*Willberly v. Mathews*, 10 Daly, 153; 91 N. Y. 648; *Cobb v. D. Mfg. Co.*, 108 id. 463; *Smith v. Cutler*, 10 Wend. 569; *Fidler v. Cooper*, 19 id. 285; *Owen v. Boerum*, 23 Barb. 187, 196; *Locke v. Tilley*, 14 Hun, 139, 142.) No evidence of mistakes of fact or law can be given to invalidate award of arbitrators. (*Morse on Arbitrations*, 214-222; *Russell on Arbitrations* [3d ed.] 111-113; *De Castro v. Brett*, 56 How. Pr. 484, 487, 488; *M. R. Coal Co. v. Coal Co. of Onondaga*, 58 N. Y. 667; *Fudickar v. G. M. L. Ins. Co.*, 62 id. 392, 399, 400, 401.) The informalities in the award do not invalidate it. (*French v. New*, 20 Barb. 481; *Ott v. Schroeppel*, 5 N. Y. 482, 485; *Platt v. Smith*, 14 Johns. 368; *Jones v. Cuyler*, 16 Barb. 576, 579, 580; *Perkins v. Giles*,

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50 N. Y. 228, 236; *Curtis v. Gokey*, 68 id. 300, 305; Code Civ. Pro. § 2365; *Diedrich v. Richley*, 2 Hill, 271; *Vosburgh v. Teator*, 32 N. Y. 561; *Bulson v. Lohnes*, 29 id. 291; *Cutter v. Cutter*, 16 J. & S. 470; *Browning v. Wheeler*, 24 Wend. 258; *Kelsey v. Darroo*, 22 Hun, 125; *Wiberly v. Mathews*, 91 N. Y. 648.)

William J. Roche for respondent. If the plaintiff had sought to recover upon the first count of the complaint, the measure of damages would be the difference between the rent which he agreed to pay and the actual yearly rental value of the premises. (*McAdam on Landlord and Tenant*, 143, 144, 145; *Trull v. Granger*, 8 N. Y. 115; *Dean v. Roesler*, 1 Hilt. 420; *Coleman v. King*, 19 Week. Dig. 551; *Larkin v. Misland*, 100 N. Y. 212.) Nor could the plaintiff recover anything for profits which he might have made in business, if he had obtained possession of the premises. (*Giles v. O'Toole*, 4 Barb. 261.) An award which is not within the terms or the substance of submission to the arbitrators is utterly void. The arbitrators are not the exclusive judges of their own powers. (*Borrows v. Milbank*, 5 Abb. Pr. 28; *Hiscock v. Harris*, 74 N. Y. 108; *People ex rel. Wasson v. Schuyler*, 69 id. 242, 247; *Halstead v. Seaman*, 82 id. 27, 31; *Briggs v. Smith*, 20 Barb. 409; 4 Denio, 144.) In case Dodds had come into court to recover damages because of the defendant's failure to put him in possession, his recovery would be limited to the sum which he could prove the store to be worth over and above the rent reserved. This fair, legal measure of damage was the only one which Mrs. Hakes could suppose under the submission, would be regarded by the arbitrators. (*Fudickar v. G. M. L. Ins. Co.*, 62 N. Y. 392, 401; *B. W. P. Co. v. Gray*, 6 Metc. 168; *Kent v. Estob*, 3 East, 18; *In re D. V. R. Co.*, 6 L. R. 429.) If the arbitrators considered matters which were not in fact submitted to them, their award is void, and the invalidity extends to the entire award, it being impossible to separate the element of damages alleged to have been sustained by reason of Dodds

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being thrown out of business, from the other element of damages, namely, the difference in the rental value of the property and the rent reserved. (*Brown v. Hankerson*, 3 Cow. 70; *Morse on Arbitration and Award*, 178, 181.)

BROWN, J. This appeal brings up for review the decision of the county judge of Rensselaer county, which dismissed the plaintiff's complaint and gave judgment for the defendant. The action was upon an award made by arbitrators under a parol submission of certain differences between the parties. It appeared that the defendant, in February, 1884, had leased to the plaintiff a certain store in the city of Troy for the term of one year beginning May 1, 1884. Defendant was unable to put plaintiff in possession of the store and a claim for damages being made, it was submitted to the arbitrators to decide, who made an award to the plaintiff of \$1,000. The complaint appears to have been dismissed upon the ground that the arbitrators in making their decision exceeded the authority conferred upon them by the submission, and that their award was, therefore, void.

Upon the trial, the plaintiff called the arbitrators as witnesses to prove the agreement to arbitrate and also to prove the award. Each upon cross-examination was asked what the basis of their award was, and how it was made up. The answers to this question were allowed over the plaintiff's objection, and the exception taken to this ruling of the court presents one of the grounds upon which the appellant asks a reversal of the judgment. The evidence objected to was admissible. It may always be shown by parol evidence, in defense or avoidance of an award, that the arbitrators acted in excess of their jurisdiction. (*Briggs v. Smith*, 20 Barb. 409; *Butler v. Mayor, etc.*, 7 Hill, 329; *People v. Schuyler*, 69 N. Y. 247; *Morse on Arbitration and Award*, 213, 214.)

The purpose of such evidence is not to vary the terms of the award, but to show that the arbitrators did award on matters not submitted to them. The law is well settled that the power of arbitrators is confined strictly to the matters submitted

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to them, and if they exceed that limit their award will, in general, be void.

They cannot decide upon their own jurisdiction, nor take upon themselves authority by deciding that they have it, but must, in fact, have it under the agreement of the parties whose differences are submitted to them, before their award can have any validity, and the fact of jurisdiction, when their decision is challenged, is always open to inquiry. (*Jackson v. Ambler*, 14 J. R. 96; *Halstead v. Seaman*, 82 N. Y. 27; *Briggs v. Smith, supra.*)

In motions to set aside awards under the statute of this state, courts are not confined to an examination of the submission and award, but may receive affidavits as to what took place at the hearing to show that the arbitrators exceeded their powers. (*Matter of Williams*, 4 Denio, 194.) Under these authorities evidence was admissible to show that the award was in excess of the jurisdiction of the arbitrators.

We must now look into the evidence to determine whether the decision was confined to the matters submitted to them. The plaintiff and defendant and both arbitrators were sworn as witnesses on this question, and there was, substantially, no difference between them as to the terms of the submission. The contract and its breach were admitted, and the question in dispute, and which was submitted to the arbitrators, was "what the damages should be." The defendant claimed also that "the good will of the business" should be considered. This expression referred to the value of the store as a stand for a plumber's business, it having been occupied for such purposes for several years prior to the lease to the plaintiff. It did not enlarge the authority of the arbitrators, as it was but an element in the value of the lease. The arbitrators testified that their award was based upon the value of the lease and the fact that Mr. Dodds had been thrown out of business, and the trial court held, and the respondent now claims, that the latter element was one not included in the submission and that its allowance vitiated the award.

As I have already pointed out, the matters submitted related

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wholly to damages growing out of the failure to give plaintiff possession of the leased property, and we think this did not include any allowance for the destruction of plaintiff's business. There was nothing said upon that subject in the submission to the arbitrators, and no such claim appears to have been made by the plaintiff in any of the conversations with the defendant prior to the agreement to arbitrate. An arbitration, like all other agreements, must be construed and interpreted with reference to the intent of the parties, so far as such intent is consistent with the language of the contract.

The term damages is one of very broad meaning, but, applied to contracts, it is limited to such as may be supposed to have entered into the contemplation of the parties, and flow naturally from the violation of the agreement, and are certain in their nature, having respect to the cause from which they proceed; and speculative profits and accidental and consequential losses are not recoverable. (*Cassidy v. Le Fevre*, 45 N. Y. 562; *Hamilton v. McPherson*, 28 id. 72.) We think the loss of business which plaintiff might have sustained from being deprived of the opportunity to occupy the store in question was not within the terms of the submission. The rule in all cases when damages are claimed solely from the failure of the lessor to give the lessee possession of the leased property is well settled, and limits the plaintiff's recovery to an amount represented by the excess of the actual rental value over the rent reserved in the lease. (*Trull v. Granger*, 8 N. Y. 115; *Pumpelly v. Phelps*, 40 id. 60.) In the use of the term "damages," therefore, in the submission as applied to the contract in question, we think the parties must be deemed to have intended that rule or measure of recovery which the law applies in analogous cases. The decision, included matters not submitted to the arbitrators and the whole award was void. If the part of an award which is void cannot be separated from that which is within the jurisdiction of the arbitrators, the whole is void. (*Brown v. Hankerson*, 3 Cow. 70; Morse on Arbitration

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and Award, 178-181.) In this case the award was of one sum of \$1,000, and it is impossible to separate that which is good from that which is bad.

These views lead to an affirmance of the judgment.

All concur, except PARKER, J., not sitting, and BRADLEY, J., not voting.

Judgment affirmed.

FREDERICK A. SCHROEDER et al., Appellants, v. DANIEL FREY et al., Respondents.

This action was brought to recover for goods sold. At the time of its commencement proceedings in bankruptcy were pending against the defendants. An order of arrest was issued in the action on the ground of false representations inducing the sale. After an injunction had been obtained in the bankruptcy court to restrain proceedings to collect the debt one of the defendants was arrested under the order. Thereupon defendants instituted proceedings to punish plaintiffs, their attorneys, etc., for contempt. Pending these proceedings plaintiffs signed a stipulation whereby they agreed that the order of arrest should be vacated, and that no additional or further arrests should be made in the action, "or any action to collect the debt, except in bankruptcy, on their part, in respect to or upon the claim or debt, for the recovery of which the action" was brought, and that either party might enter an order *ex parte* to that effect. The defendants having been adjudicated bankrupts, set up their discharge in bar. Plaintiffs, on the trial, offered evidence tending to prove that the debt in suit was fraudulently contracted. Defendants objected, producing the stipulation in support of their objection, and claiming that under it plaintiff's proceedings were limited to the bankruptcy court, and they could proceed to judgment in the action only in case the discharge was refused. The objection was sustained. *Held*, error; that the stipulation did not deprive plaintiffs of the right to prove that their debt was not one of those from which defendants were relieved by their discharge.

(Argued April 18, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 28, 1886, which affirmed a judgment in favor of plaintiffs, entered upon a verdict directed by the court.

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This action was commenced in 1877 to recover upon an alleged indebtedness for goods sold by the plaintiffs to the defendants. At that time an involuntary petition in bankruptcy had been filed against the defendants, pursuant to the act of congress of 1867, in the United States District Court of the southern district of New York, and the proceedings in bankruptcy were then pending in that court. An order of arrest was made in the action by virtue of which the defendants were arrested. And afterwards the attorneys of the parties made a stipulation entitled in the action of which the following is a copy with the title omitted:

"We hereby stipulate and agree that the order of arrest granted in this action be vacated and set aside, and the undertaking therein vacated and the sureties discharged, and plaintiffs stipulate that no additional or further arrests will be made in this action, or any action to collect the debt, except in bankruptcy, on their part, in respect to or upon the claim or debt for the recovery of which this action is brought, and that either party may enter an order *ex parte* to this effect.

"JOHN HENRY HULL,
"Plaintiffs' Attorney."

"M. H. REGENSBURGER,
"Defendants' Attorney."

Upon that stipulation an order was made by the Supreme Court in April, 1878, vacating the order of arrest and the undertakings and discharging and exonerating the sureties thereon from liability.

In the proceedings in bankruptcy instituted by such petition, the defendants having been adjudicated bankrupts, were afterwards duly discharged, and thereupon they, by answer to the complaint, alleged such discharge in bar, and upon that defense a verdict was directed for the defendants.

The further material facts are stated in the opinion.

William C. De Witt and *John Henry Hull* for appellants.
A stipulation between parties to an action must, in order to

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constitute a bar against the recovery of an honest debt, or the imposition of a common-law liability, plainly express such an intent and agreement in terms and meaning. And if upon the very point of such an estoppel the stipulation be obscure and ambiguous, or open as well to an interpretation favorable to the enforcement of the debt or right as against it, it cannot prevail as a bar. (*Edsal v. C. & A. R. & T. Co.*, 50 N. Y. 661; *Clark v. N. Y. L. Ins. and F. Co.*, 64 id. 40; *French v. B., N. Y. & E. R. R. Co.*, 4 Keyes, 112, 113; *Schieflin v. Harvey*, 6 Johns. 180; *Alexander v. Greene*, 7 Hill, 547; *N. J. S. N. Co. v. Merchants' Bk.*, 6 How. [U. S.] 383.)

Melville H. Regensburger for respondents.

BRADLEY, J. The defense rested upon the discharge of the defendants in bankruptcy. For the purpose of overcoming the force of such discharge, the plaintiffs offered evidence tending to prove that the debt to recover which the action was brought was contracted in fraud by the defendants, that is to say, that they, by fraudulent representations, induced the plaintiffs to give them credit. In support of the objection to the evidence, the defendants' counsel introduced the stipulation. The evidence was excluded and exception taken. The question presented on this review is one of construction and effect of such stipulation. The defendants' counsel contends that the purpose of it was, that the plaintiffs should limit their proceedings to the bankruptcy court so far that they should proceed to judgment in this action, only in the event the discharge in bankruptcy should be refused. If the stipulation is entitled to such construction, the evidence offered was properly excluded, because effect must be given to the agreement of the parties. The stipulation contains no provision for the discontinuance of the action in any event. The only purpose clearly expressed in the instrument is, that the order of arrest and the undertaking made in that behalf be vacated, and that no further arrests should be made in the action. Beyond that there is an apparent obscurity, in view of the language used, as to what, if any-

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thing, further than the subject of the arrest of the defendants, was within the intention of the parties. The right to enter an order *ex parte* upon the stipulation was made available by the defendants' attorney, upon whose motion an order seems to have been entered. And, although the stipulation authorized its entire effect to be embraced in such order, the latter merely directs the vacation of the order of arrest and undertaking, and exonerates the sureties from liability. The order, therefore, furnishes no aid to the construction which the defendants seek to have given the stipulation. The use they endeavor to make of it is to deny to the plaintiffs the right, which they might otherwise have, to prove that the debt was not within those from which the defendants were relieved by their discharge in bankruptcy. The claim that the plaintiffs relinquished such right, cannot rest upon presumption or mere doubtful construction, but must have for its support a reasonable degree of certainty. When the language of a contract is plain and free from ambiguity, the understanding of the parties to it must be ascertained from its terms. And then whatever those terms fairly imply will be deemed embraced within it. (*Rogers v. Kneeland*, 10 Wend. 219; *S. C.*, 13 id. 114.) It is when the meaning of an instrument is uncertain that resort may be had to extrinsic circumstances, leading to and attending the transaction, in aid of the interpretation of the language employed to express its terms. (*Blossom v. Griffin*, 13 N. Y. 569; *Springsteen v. Samson*, 32 id. 703; *Calkins v. Falk*, 39 Barb. 620. *Field v. Munson*, 47 N. Y. 221.)

The record before us embraces but very little, other than the instrument itself, entitled to consideration on the question of construction. For the purpose of the proceeding in bankruptcy then pending, the defendants were subjected to the jurisdiction of the District Court of the United States. It seems that two of the defendants had been arrested by virtue of an order of arrest made in this action, and that the arrest of another one of the defendants pursuant to such order, after an injunction had been, by the defendants, obtained in the District Court to restrain proceedings to collect the debt, was

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made the ground for a proceeding in that court to punish the plaintiffs, their attorneys and the sheriff for contempt. While that proceeding was pending the stipulation was made, and such proceeding was abandoned. This is all that appears upon the subject of the inducement to the stipulation, or relating to the circumstances bearing upon its purpose. This relieved the defendants from the arrest and from liability to arrest in aid of the purpose of an action for the collection of the debt, and the plaintiffs from the proceeding for contempt. The action is not founded on fraud, and no execution can go against the person of the defendants if recovery be had. They, therefore, do not attempt to make, and cannot make, fraud available for any purpose other than to defeat the effect of the discharge as a bar to the action. The construction which the defendants seek to give to the stipulation, is such as to embrace in it an agreement on the part of the plaintiffs to submit, for all the purposes of this debt, to the discharge, and thus relinquish all claim upon the defendants for it, except such benefit as might result to them from the distribution of the assets of the bankrupts. If such was the understanding, or if the relinquishment by the plaintiffs of the right, in any event, to make the charge of fraud available in their attempt to collect the debt, otherwise than for the purpose of the arrest of the defendants, was within the intention of the parties, they were unfortunate in the use of language for the purpose of giving such import to their stipulation. An agreement to that effect would have required a discontinuance of the action upon the granting of the discharge. And it would seem that if such had been the understanding, a provision to that effect would have been inserted in the stipulation. That, however, is but a circumstance which is only entitled to consideration as it may bear upon the question of the intention of the parties when they made the agreement. If the use now sought to be made of the charge of fraud was not then in the contemplation of the parties, it may be urged that it is not within the purpose of the stipulation. It is now unnecessary to attempt to explain the purport of the latter clause of the

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stipulation, or to presume what was intended by it. It might, perhaps, be difficult to do so. It is sufficient for the purpose of the present inquiry, founded, as it must be, solely upon the evidence furnished by the record, that the instrument does not appear to deny to the plaintiffs the right to prove that the debt for which the action was brought was not within those from which the defendants were relieved by their discharge in bankruptcy. And such is the conclusion.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except FOLLETT, Ch. J., and VANN, J., dissenting.
Judgment reversed.

THOMAS CORNELL, Respondent, v. WILLIAM HAYDEN,
Appellant.

In 1855 H. contracted to sell certain premises to defendant, who covenanted to pay the purchase-price in annual installments; the deed to be delivered when the whole was paid. It was provided in the contract that in case of non-performance on the part of defendant of any of his covenants the contract should become void and H. have the right to enter into possession, "the same as if the contract had never been signed." Defendant entered into possession and occupied it until March, 1863, paying none of the principal, but paying the interest under an oral agreement. He then transferred his interest in the contract to J., who continued to occupy, under a similar verbal agreement, until his death in 1870. He left surviving him his widow and three children, all infants, who had no estate except their interest in the contract. The widow occupied under a similar verbal arrangement, paying interest up to February 1, 1875, but none of the principal. Before that time one of the children died a minor and intestate. Since that time no interest has been paid. Prior to February, 1877, the widow advised H. that she was unable to pay and asked him to abandon the contract, to which he consented. She had arranged with plaintiff that he would pay her \$289.50, and pay H. the amount unpaid on the contract if the latter would deed to him; this H. agreed to do. Thereupon the widow, acting on behalf of herself and her children, assigned the contract to plaintiff, agreeing to surrender possession April 1, 1877. In pursuance of this arrangement the contract was surrendered to H., who deeded the premises to plaintiff, the latter paying to the widow the sum agreed. In 1878 defendant rented part of the premises of the widow,

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and in April of that year was appointed general guardian of the children. After the widow left the premises he occupied the whole premises under a claim of right as guardian, and refused, on demand by plaintiff, to deliver up possession. He tendered to plaintiff a sum greater than the contract-price and interest unpaid, but conditioned upon the latter's executing a deed to the children. In an action of ejectment, held, that on the death of J. the obligation to pay devolved upon his widow and heirs, and upon demand made of either of them and refusal to pay, plaintiff was entitled to recover possession; that neither the infancy nor widowhood released or modified the obligation or extended the time of payment; that, conceding the right to a specific performance had not wholly ceased to exist, but remained suspended and could have been revived by a tender, that made was insufficient, because coupled with a condition that plaintiff would convey absolutely, although he had acquired and was entitled to retain the widow's interest; also, that there was no equitable defense in favor of defendant, who, while standing in the relation of tenant to plaintiff, procured himself to be appointed guardian of part of the owners, and thereupon denied the title of his landlord and claimed the right to occupy the whole premises.

(Argued April 15, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 4, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

William Lounsbury for appellant. The agreement from Mrs. King and her husband to the plaintiff, in March, 1877, did not operate as a conveyance of the interest of the two minor children of Joseph Hayden. (*Cagger v. Lansing*, 64 N. Y. 428; *Emerson v. Spicer*, 46 id. 594.) A contract for the purchase of land goes to the heir. (Story Eq. Juris. § 790; Fry on Specific Performance, § 118; *Watson v. LeRow*, 6 Barb. 481; 3 Johns. Ch. 312; 6 id. 398; 11 Paige, 268; 34 Barb. 173; 48 id. 330.) When the defendant was appointed by the surrogate he took the place of guardian in socage, and he represented the infant's right of possession. (*Emerson v. Spicer*, 46 N. Y. 594.) The defendant can interpose an equitable title as a defense. (*Crary*

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v. *Goodman*, 12 N. Y. 266.) The Jansen Hasbrouck contract was a valid and subsisting contract at the time of the commencement of the action. (*Stevenson v. Maxwell*, 2 N. Y. 408; *Stone v. Sprague*, 20 Barb. 509; *Parker v. Parmalee*, 20 Johns. 130; *Gale v. Nixon*, 6 Cow. 445; *Morris v. Sliter*, 1 Denio, 59.) The plaintiff in case he disputed the sufficiency of tender, was bound to make a demand of purchase-money and tender deed to put defendant in default. Possession was notice to plaintiff. (*Park v. Jackson*, 11 Wend. 442.) The contract was binding on the vendees, the heirs-at-law of Joseph Hayden. They were in possession and were liable to pay. They could not rescind. (*Tompkins v. Hyatt*, 28 N. Y. 347; *Goeth v. White*, 35 Barb. 76.) The tender of the contract-price and interest entitled the defendant to a deed and was a bar to the action. (*Stone v. Sprague*, 20 Barb. 509.) The defendant's delay is accounted for reasonably. (*Tompkins v. Hyatt*, 28 N. Y. 347; *Goeth v. White*, 35 Barb. 76; *Duffy v. O'Donovan*, 46 N. Y. 223.)

John J. Linson for respondent. The surrender of the contract by Mrs. King, under the circumstances, and her abandonment of the premises for a valuable consideration, were valid and effectual acts and divested the infant heirs of such interest as they had left in the premises. (2 R. S. [7th ed.] chap. 1, tit. 1, art. 1, § 5, 2162; *Tyler on Infancy*, 239-241, 263; *White v. Parker*, 8 Barb. 71; *Field v. Schieflin*, 7 Johns. Ch. 150; *Emerson v. Spicer*, 46 N. Y. 594; *Bryne v. Van Hoesen*, 5 Johns. 66; *Holmes v. Seely*, 17 Wend. 75; *Sylvester v. Rolston*, 31 Barb. 287; *Cagger v. Lansing*, 64 N. Y. 425; *Weed v. Ellis*, 3 Caines, 253; *McPherson on Infancy*, 37; *Torry v. Black*, 58 N. Y. 185.) The transaction between Mr. Hasbrouck and Mrs. King amounted to a valid rescission of the contract as against all the world, and the same become void. (2 R. S. [7th ed.] chap. 1, tit. 3, § 1, 2197; *Hawley v. James*, 5 Paige, 318; *Moore v. Burrows*, 34 Barb. 174; 3 R. S. [7th ed.] chap. 2, § 6, 2211; *Lawrence v. Miller*, 86

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N. Y. 131; *Bakeman v. Pooler*, 15 Wend. 637; *Nelson v. P., etc., Co.*, 55 N. Y. 480; *Carman v. Pultz*, 21 id. 547; *Brinkerhoff v. Olp*, 35 Barb. 27; *Havens v. Patterson*, 43 N. Y. 222.) No right remained in either party, or in any representative of either, to claim specific performance, and no tender could revive the contract. (*Arnoux v. Homans*, 25 How. Pr. 427.) To make the tender effectual it should have been continuing; the money should have been brought into court or deposited, with notice to plaintiff, and the tender thus kept alive. (*Becker v. Boon*, 61 N. Y. 317; *Simpson v. French*, 25 How. Pr. 464; *Brown v. Ferguson*, 2 Denio, 196; *Kortright v. Cady*, 23 Barb. 490; *Wilder v. Seelye*, 8 id. 408; *Holdenby v. Tuke, Willes*, 632; *Giles v. Hart*, Salk. 622; *Whitlock v. Squire*, 10 Mod. 81.) The defendant has been guilty of inexcusable laches. (*Delavan v. Duncan*, 49 N. Y. 485; Fry on Specific Perform. §§ 730-732; Story's Eq. Jur. §§ 771-781; *Taylor v. Longworth*, 14 Pet. 172; *Havens v. Patterson*, 43 N. Y. 218; Bing. on Infancy, 99; Chambers on Infancy, 416-421; *Griffin v. Griffin*, 1 Sch. & Les. 352.) Under the circumstances, defendant was not entitled to notice to quit before ejectment brought against him. (*Pierce v. Tuttle*, 53 Barb. 156; *Jackson v. Miller*, 7 Cow. 747; *Harris v. Frinck*, 49 N. Y. 33; *Wright v. Moore*, 21 Wend. 230.)

POTTER, J. This is an action of ejectment brought to recover a lot of land situated in the county of Ulster. The original answer was a denial. In the course of the trial the defendant was allowed to prove facts outside of such issue and tending to the establishment of an equitable defense. The action was tried by the court and without a jury, by consent.

The court found the following facts: That Jansen Hasbrouck, the owner of the premises in question on February 1, 1855, entered into a contract to sell and convey the same to William Hayden in consideration of the sum of \$1,084.50, in five equal annual payments, with interest annually on all sums unpaid on the first day of February in each year until the whole sum was paid, when Hasbrouck was to execute and deliver to Hayden a

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warranty deed of the premises in question. By the terms of the contract, in case of non-performance of all or any part of the agreement by Hayden, the contract was to become null and void, and Hasbrouck was to have the right to enter into the possession of the premises the same as if the contract had never been executed. After the execution of the contract William Hayden entered into the possession of the premises and occupied them until the twenty-fourth of March 1863. During all this time he paid no part of the principal, simply paying the interest up to the first of February 1863, under an oral arrangement between himself and Hasbrouck. On the 24th of March, 1853, William Hayden sold and transferred all the interest he had in the contract to his brother Joseph Hayden, who immediately entered into the possession of the premises and continued in possession of the same until his death in 1870, when he died intestate. Joseph Hayden did not pay any of the principal of the purchase-price mentioned in the agreement, but paid the interest under a similar verbal arrangement with Hasbrouck, up to the first day of February 1869, having made the last payment of interest on the fourth day of February 1869. Joseph Hayden left him surviving, Mary his widow, and three children by her, all infants.

The youngest child died in the latter part of 1871, leaving Mary, his mother, and his infant brother and sister his sole heirs. The children had no estate other than the interest which they obtained in this contract by the death of their father, Joseph Hayden, and the interest which the surviving children obtained in the contract by the death of the youngest child. Mary, after the death of her husband, occupied the land until the latter part of April, 1877, paying the interest under a similar arrangement between her and Hasbrouck, up to February 1, 1875, but none of the principal. All of the children lived with her until the death of the youngest, and the other two down to the time when she left the premises, when they lived with her elsewhere, being supported and maintained by their mother from the time of the death of their father. For a short time before the mother's death one of the children, and since the mother's

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death both, have resided with the defendant. . The interest on the money agreed to be paid by the contract has not been paid since February 1, 1875, nor has any part of the principal been paid down to that time. Sometime prior to the 1st of February, 1877, the widow went to Hasbrouck and informed him that she would have to abandon the contract, that she had no money and could not procure any money to pay it up. Hasbrouck gave her further time, but after some little time she again went to him and told him she was unable to pay it and asked him to abandon the contract, and he consented to its abandonment. Thereupon Hasbrouck and the widow mutually consented to and did abandon the contract. As part of the transaction in regard to the consent to abandon the contract, at the solicitation of Mary, the plaintiff agreed to pay her the sum of \$289.50, and also, with her consent, agreed to pay the amount unpaid upon the contract, if Hasbrouck would execute a deed of the premises to him. In pursuance of such agreement Mary, who had married again, with her second husband, King, acting in behalf of herself and the children, executed an assignment of the contract, bearing date the 2d day of March, 1877, to the plaintiff, with authority to receive a deed of the land from Hasbrouck and agreeing to deliver possession to the plaintiff April 1, 1877. The plaintiff having been informed by Hasbrouck that he would execute a deed to him, if desired by Mary, in pursuance of the agreement, the contract was surrendered to Hasbrouck, who executed and delivered a deed of the premises to him, bearing date on the 3d day of March, 1877, which was duly recorded on the 6th day of March, 1877. The plaintiff at the time of the execution of the assignment paid to Mary and to her husband the sum of \$289.50, which was on account of taxes and improvements claimed to have been paid by her, and at the time of the execution of the deed by Hasbrouck to plaintiff, plaintiff paid the amount unpaid on the contract. Mary had no money of her own or property of the infants wherewith to pay the money unpaid on the contract, and the only way anything could be realized for herself or the children out of the premises was by taking

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the course she did. In 1876 the defendant rented part of the house on the premises from Mary, she occupying the remaining portion of the house. On the ninth of April the defendant was regularly appointed general guardian of the person and estate of the two surviving children of Joseph Hayden. The infants being, respectively, of the age of eight and ten years.

The defendant has continued to reside on the premises since the time he entered on the same as the tenant of Mary, the widow, and still resides on the same, and since Mary has moved off has occupied the whole of the premises under a claim of right as guardian of the children, and has refused to deliver up the possession of the same to the plaintiff after demand made upon him before the commencement of this action, and he made tender of a sum which was found by the trial court to be more than the purchase-price under the contract and the interest unpaid; this tender was, however, upon condition that plaintiff would execute a deed of the premises to the children. No guardian was ever appointed for the children by any court before the appointment of the defendant. The guardianship of the infants with the rights, powers and duties of a guardian in socage were vested in the mother from the death of their father until the appointment of the defendant as the general guardian. The value of the use and occupation for the five years is \$600.

The lands embraced in this contract had the characteristic of real estate to said Hayden, and retained the same by the assignment to Joseph Hayden. Upon his death it went to his widow, Mrs. King and their children, with the characteristics of doweress and heirs-at-law. Upon the death of one of the heirs, his right went to Mrs. King, his mother, for life. From the time of the death of her husband and child, Mrs. King was doweress, had a life estate in the one-third of the estate, subject to her dower right, and was guardian in socage for the other two children in respect to their interest in the lands. The obligation rested upon her and the infants to make the payments called for by the contract. If she failed to do so after demand of payment, the vendor could rescind the con-

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tract and bring an action to recover possession or take possession of the premises by any means short of a breach of the peace or forcible entry.

It is obvious, from this state of facts, that there was default of long standing, not only in paying any part of the principal debt or purchase-price, but in the payment of the interest since February 1, 1875, and that the vendor upon demand of the payment and a neglect or refusal upon the part of the vendee, or those standing in that relation, to do so within a reasonable period, could maintain an action to recover or take peaceful possession without action. Neither the infancy of the heirs nor the widowhood of the wife of the assignee of the vendee, or the laches of the infants, released or modified in the least degree the obligation of the payment of the purchase-price or extended the time of its payment. (*Havens v. Patterson*, 43 N. Y. 218-222.)

She had, while holding the title as doweress and as the heir of her deceased child and the guardian in socage of the other two infant heirs, twice come to the vendor and represented to him that neither she nor the infant heirs had any money or means, nor was there any estate of her deceased husband with which to pay the purchase-price or any part of it, or the interest in arrear thereupon, and asked him to abandon the contract and to release them from its obligations. The vendor consented to do so and she promised to abandon the contract and to yield the possession of the premises to the vendor. As we have seen, if the vendor had demanded payment of the purchase-price or the interest within a reasonable period, and such demand was not complied with, the vendor could have recovered the possession in an action brought for that purpose, or could have resumed the peaceful possession of the premises, and it would have been sufficient to maintain such action that demand of payment was made upon any one of those upon whom the obligations to pay rested. (*Havens v. Patterson, supra*; *Carman v. Pultz*, 21 N. Y. 547.)

It can not, it seems to me, be reasonably contended that the fact that the widow, and owner of the one-third and the

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guardian in socage of the owners of the remainder of the premises, desired to be released from the contract and to abandon the same, and who had no means or way to pay or perform the contract, should be less potential in enabling the vendor to recover or to take possession of the premises than a demand of payment of the principal or interest and a non-compliance with such demand. It follows, from these premises, that the vendor could have maintained an action to recover these premises at the time he conveyed them to the plaintiff.

The result we have reached is based wholly upon the legal rights existing between plaintiff, standing in the position of the vendor by virtue of his deed, and the defendant, because of the default of payment. We will consider briefly the equitable relations existing between the plaintiff and defendant, and see whether they require or should produce any change from the legal result. The plaintiff had purchased of Mrs. King her dower interest, and also an estate for life, as heir of the deceased child, and paid her therefor the sum of \$289.59, and received a transfer of those interests in March, 1877. Previous to this, and in 1876, defendant had leased of Mrs. King, and gone into the occupancy under such lease, a portion of the premises, and continued so to occupy until after the transfer by Mrs. King to the plaintiff. After this transfer the defendant procured himself to be appointed the general guardian of the two surviving infant heirs, and when the plaintiff demanded possession of the premises of the defendant, the latter claimed the right of possession as the general guardian of the surviving infants. Assuming now, as was done upon the trial, that the pleadings permitted the evidence upon the trial tending to establish a right to specific performance of the contract of sale between Jansen Hasbrouck and Hayden, we encounter these difficulties: First. The right of specific performance had been lost to the vendee and those succeeding to his position under the contract. Second. If such right had not totally ceased to exist, but remained suspended, the tender required to revive the right was accompanied with the condition that the plaintiff should execute an unqualified deed of the premises to the two

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surviving heirs, regardless of the right which he had acquired of Mrs. King and paid for, and without any recognition whatsoever of those rights. The plaintiff had certainly acquired the estate of Mrs. King while the defendant was her tenant in the occupation of a portion of the premises, and, by operation of law, he became the tenant of plaintiff upon the plaintiff's purchase from Mrs. King. The defendant, while standing in the relation of tenant of the plaintiff, got himself appointed the general guardian of a part of the owners of the premises, and then denied the right of his landlord and claimed the right to occupy the whole of the premises. We perceive no equity in such defenses to the plaintiff's action.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THE NATIONAL ULSTER COUNTY BANK, Appellant, v. MICHAEL J. MADDEN, Impleaded, etc., Respondent.

114 280
131 662

114 280
150 892 An original entry or a memorandum, made by a witness at the time of a transaction, is admissible in evidence as auxiliary to his testimony only when he is unable to distinctly recollect the fact without its aid. The evidence is admitted only as a matter of necessity. Where the witness has a distinct recollection of the essential facts to which the entries relate, the primary common-law proof may be furnished, the necessity for the secondary evidence does not arise, and so it is incompetent.

Bigelow v. Hall (91 N. Y. 145) distinguished.

Where it is made to appear that a check, indorsed over by the payee, was altered after his indorsement without his consent, the presumption is that it was so made as to vitiate it, as against the indorser, and the burden is upon the party seeking to enforce it to relieve it from the effect of the unauthorized indorsement by showing that it was made by a stranger to the instrument.

Nat. Ulster Co. Bk. v. Madden (41 Hun, 118) reversed.

(Argued April 22, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order

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made at the June Term, 1886, which affirmed a judgment in favor of defendant Madden, entered upon a verdict.

The nature of the action and the material facts are stated in the opinion.

John J. Linson for appellant. It was error to allow Madden to read from his book the entries he said he made in it, at the time he indorsed the checks, of the date, amount of and time when the checks were made payable. (*Russell v. H. R. R. R. Co.*, 17 N. Y. 134; *1 Phil. Ev.* 289; *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Collins v. Rockwood*, 64 How. Pr. 57; *Meacham v. Pell*, 51 Barb. 65, 67, 68; *Deshon v. Ins. Co.*, 11 Metc. 209; *Thurman v. Mosher*, 1 Hun, 340; *Ashley v. Woolcott*, 11 Cush. 196; *Brown v. Thurber*, 58 How. 97.) It was not a part of the agreement itself, and, therefore, no part of the *res gestæ*. (*Moore v. Meachim*, 10 N. Y. 209; *Flood v. Mitchell*, 68 id. 509; *Howard v. McDonough*, 77 id. 592.) The rule that a party signing a paper with a blank in it authorizes the parties intrusted with the paper to fill in the blank as he pleases, though it be in direct contradiction to the agreement made, when signed applies. (*Booth v. Powers*, 56 N. Y. 31; *Kitchen v. Place*, 41 Barb. 465; *Bank v. Schuyler*, 7 Conn. 336; *Van Duser v. Home*, 21 N. Y. 531.)

E. S. Wood for respondent. The question whether the checks had been fraudulently altered by the drawee was one exclusively of fact and solely for the jury to determine. (*Wood v. Steele*, 6 Wall. 80; *Crawford v. West Side Bank*, 100 N. Y. 53, 54; Daniels on Neg. Inst. § 1660.) The change in the time of payment of the checks, by making them payable from twenty days to three months later than the date of the instrument, was a material alteration that changed the liability of the indorser and rendered the instrument void. (Edwards on Bills, 95; *Crawford v. W. S. Bank*, 100 N. Y. 50, 56; 49 Sup. Ct. 68; *Vance v. Lowther*, L. R., 1 Ex. Div. 176; *Master v. Miller*, 4 Term Rep. 320; Smith's Leading Cases, 458 [English and American Notes]; *Wood v. Steele*, 6 Wall.

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80; *Britton v. Dierker*, 2 Am. Rep. 553; 45 Mo. 591; *Waterman v. Vose*, 43 Me. 511; *Heffner v. Wenrich*, 36 Penn. St. 423; 2 Pars. Notes and Bills, 550; *Wyerhauser v. Dun*, 1 East. Rep. 720.) The entries in his book by Madden was an original memorandum made by the party himself, sworn to be correct, and was part of the *res gestae* and properly received in evidence. (*Guy v. Mead*, 22 N. Y. 462; *Peck v. Valentine*, 94 id. 569; *Mayor, etc., v. Second Avenue R. R. Co.*, 31 Hun, 241; *Ellsworth v. Aetna Insurance Company*, 21 Week. Dig. 469; *Bigelow v. Hall*, 91 N. Y. 145; *Riordin v. Davis*, 29 Am Dec. 442; *Fish v. Adams*, 37 Mich. 598; *Meyer v. Reichardt*, 112 Mass. 105; *Reed v. U. S. Ex. Co.*, 48. N. Y. 468.) Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is in general admitted. All evidence falling short of this is in its degree termed secondary. (1 Greenleaf, § 84.) Oral evidence cannot be substituted for any writing the existence of which is disputed, and which is material either to the issue between the parties, or to the credit of the witness, and is not merely the memorandum of some other fact. (1 Greenleaf, § 88; *Rehburg v. Mayor, etc.*, 1 East, 182.) Where blanks are intentionally left in a note, check or other instrument the party who is intrusted with the use of the instrument, or the person to whom it is delivered for use, has implied authority to fill actual blanks by inserting the amount, the time, or place of payment, and the party who has left such blanks will be bound by the terms of the completed, perfected instrument, on the theory that he has made the other his agent for the purpose of making it perfect. (*Angle v. N. W. M. L. Ins. Co.*, 2 Otto, 330, 338, 339, 340; *Wyerhauser v. Dun*, 1 East. Rep. 720.) The general rule in respect to the alteration of commercial paper, and the effect of that alteration to discharge the prior parties to it, is well settled and must prevail. (*Nat. Bk. of Commerce v. N. M. B. Assn.*, 55 N. Y. 211; *S. V. Bk. v. Loomis*, 85 id. 207.) The act, therefore, of interlining the new matter is equivalent to the erasure of written or printed matter in an instrument, and the substi-

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tution of something else in its place. Such acts have always been held to render the instrument void. (*Angle v. N. W. M. L. Ins. Co.*, 2 Otto, 330.) There is no principle in the law of estoppel that applies to the defendant Madden in this case. (*Britton v. Dierker*, 2 Am. 553; *Wood v. Steele*, 6 Wall. 80; *Crawford v. W. S. Bk.*, 49 Sup. Ct. 68; 100 N. Y. 50; *Bk. of Comm. v. Mechanics' Bk.*, 55 id. 211; *Marine Bk. v. City Bk.*, 59 id. 67; *Susquehanna Bk. v. Loomis*, 85 id. 207; *Vance v. Lowther*, 16 Moak's Eng. Rep. 583; *Trigg v. Taylor*, 72 Am. Rep. 263.)

BRADLEY, J. The action was brought to recover the amount of eighteen checks drawn by the defendant Sarah M. Fowks, by her attorney, Horatio Fowks, upon the National Bank of Rondout, and payable to the order of the defendant Madden, and indorsed by the latter. Madden alone defended, and alleged that after the checks were indorsed by him they were altered in respect to the time for payment, so as to make them payable at a future day without his knowledge or consent. He testified that, when so indorsed by him, no time of payment was expressed in any of them. When they were discounted by the plaintiff they, respectively, appeared to be payable at specified times subsequent to their dates. The defendant Madden also testified that when he indorsed the several checks he made a memorandum entry of the dates, amounts and time when payable of them, respectively; and in his examination in chief, in his own behalf, he was permitted, against the objection and exception of the plaintiff's counsel, to read such memoranda to the jury. The main question arises upon the admissibility of those entries in evidence. The rule in this state prior to the decision in *Merrill v. Ithaca and Owego Railroad Company* (16 Wend. 586) was, that a witness might refer to his memorandum to refresh his memory, and then was permitted to testify to the facts, provided he could do so independently of it upon his recollection. That was the extent of the rule in this respect. (*Feeter v. Heath*, 11 Wend. 479; *Lawrence v. Barker*, 5 id. 301.) In the *Merrill Case* the

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court reviewed the cases, and cited text books upon the subject, and announced the conclusion that original entries read by a witness, and which he should testify were correctly made, might be read in evidence, though he remembered nothing of the facts represented by them, but that to render such entries admissible, it should appear that "every source of primary evidence had been exhausted." Since then, so far as we have observed, it has uniformly been held admissible for the witness to refer to the original entries in respect to the facts which he is called upon to testify, and if he verifies their correctness, and is unable to recollect such facts, independently of such entries, they may be read in evidence. (*Bank of Monroe v. Culver*, 2 Hill, 531; *Cole v. Jessup*, 10 N. Y. 96; *Halsey v. Sinsebaugh*, 15 id. 485; *Russell v. H. R. R. R. Co.*, 17 id. 134; *Guy v. Mead*, 22 id. 462; *Squires v. Abbott*, 61 id. 530-535; *Howard v. McDonough*, 77 id. 592; *Peck v. Valentine*, 94 id. 569; *Mayor, etc., v. Second Ave. R. R. Co.*, 102 id. 572-580; *Brown v. Jones*, 46 Barb. 400; *Meacham v. Pell*, 51 id. 65; *Kennedy v. O. & S. R. R. Co.*, 67 id. 170-182.)

The General Term cited, on this question, *Guy v. Mead*, and made the remark that while that case differed from this, in the fact that there the witness had no recollection of the matter, independently of the memorandum referred to, the court did not place its decision upon that ground. Although, in that case, the court did not expressly declare that the admissibility of the evidence was dependent upon the want of recollection of the witness, the fact existed which rendered the paper competent evidence within the rule as before stated; and reference was there, with apparent approval, made to *Russell v. Hudson River Railroad Company (supra)*, where the judgment of the court below was reversed for error in receiving a memorandum in evidence when, for aught that appeared, the witness had recollection of the facts to which he was called upon to testify, independently of it. And the cases above cited, determined subsequently to *Guy v. Mead*, state and adhere to the doctrine that original entries made by a witness are admissible as auxiliary to his evidence, only when he is unable to dis-

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tinctly recollect the fact without the aid of it. This proposition seems well settled in this state by a current of authority for the last fifty years, which now requires adherence to it, unless it may be seen that it works unjustly upon the rights of the parties. The rule which renders such entries admissible rests upon the principle of necessity for the reception of secondary evidence, and is not applicable where the witness has a distinct recollection of the essential facts to which they relate. The primary common-law proof is then furnished, and the necessity for evidence of the lesser degree does not arise. And this right, so qualified, to introduce such secondary evidence is the better rule, in view of the opportunity which otherwise might exist, to superadd a written memorandum to the evidence of a witness, which it cannot be said might not sometimes be improperly made available to strengthen his testimony with a court or jury, and such may be within reasonable apprehension until the moral infirmity of human nature becomes exceptionally less than it yet has. This reason for the rule so limited has also been in the minds of the courts in deciding the cases declaring it. (*Meacham v. Pell*, 51 Barb. 65-68; *Driggs v. Smith*, 4 J. & S. 283; *Russell v. H. R. R. Co.*, 17 N. Y., 134.)

In holding, as we do, that entries made by a witness are not admissible, unless it appear that he does not recollect the occurrence to which they relate, independently of them, we but reaffirm what may be deemed the rule already quite well established in that respect. In the present case it not only did not so appear, but the evidence of the defendant fairly indicated that his recollection was distinct of the facts in issue, to which his memoranda referred. The ruling which permitted the entries to be read in evidence, therefore, was error, unless they may, as contended by the defendant's counsel, be considered admissible as part of the *res gestae*. It is difficult to see that it does, and we think it does not come within that doctrine. The entries were made by defendant, and were descriptive of the papers indorsed by him. The acts which he then was called upon to do, and did do, were to indorse the

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checks. The fact of the indorsement by him of his name upon them is not questioned. The act of making the entries was not illustrative of that of the indorsement, nor did it tend to characterize it, and it does not come within the rule requisite to permit it to be treated as part of the transaction. (Wharton's Ev. § 259; *Nutting v. Page*, 4 Gray, 584; *Moore v. Meacham*, 10 N. Y. 207; *Tilson v. Terwilliger*, 56 id. 277.)

The case of *Bigelow v. Hall* (91 N. Y. 145), is not applicable in that respect to the situation presented in this case. There the parties participated in making the entries at the time of the transaction, and they had relation to it, while here the current entries were made by the defendant alone, and all that Fowks appears to have done was to make from time to time entry of a supposed past act of payment of a previously indorsed check, and that was done before the defendant's entry descriptive of the succeeding one, and with the latter entry the party procuring the indorsement had nothing to do, nor does it appear that he was then advised of the entry as made by the defendant. (*Brown v. Thurber*, 58 How. 95-97.)

The evidence of the person who represented the drawer of the checks, and drew them as her attorney, was contradictory of that given by the defendant Madden in every respect essential to the issue presented at the trial. It cannot be seen that the reading to the jury of the memoranda may not have had some influence upon their action on the main question of fact, which they were required to determine.

The alleged alteration was a material one, and the finding that it was made after the defendant's indorsement, and without his consent, presumptively required the conclusion that the checks so altered were rendered invalid as against the indorser, and that such defendant was entitled to a verdict. (*Crawford v. West Side Bank*, 100 N. Y. 50.)

The presumption in such case is, that it was so made as to vitiate it, and the burden is with the party seeking to make an altered instrument the basis of recovery to relieve it from

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the effect of the unauthorized alteration, which may be done by showing that it was made by a stranger to it., (*Waring v. Smyth*, 2 Barb. Ch. 119; *Herrick v. Malin*, 22 Wend. 388; *Smith v. McGowan*, 3 Barb. 404.)

Nothing appears in this case to indicate that any relief in that manner can be had from the effect of the alteration, if the jury find it was made after the indorsement and without the knowledge or consent of the indorser.

No other question presented here by the plaintiff's counsel seems to require consideration.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except PARKER, J., not sitting.

Judgment reversed.

ZIPPORAH R. CLARK, Respondent, v. HENRY V. MCNEAL et al.,
Appellants.

The rule that where one who has purchased real estate, with full notice of an equitable claim of another thereto, transfers it to a *bona fide* purchaser, the latter not only takes a good title, but can transfer such a title to one who purchases with full knowledge of the fact, is subject to this exception, where the transfer is back to the original purchaser, who was guilty of constructive fraud in transferring the property; if it becomes revested in him, the original equity will re-attach to it in his hands.

After the assignment of a mortgage, which was not recorded, the mortgagee, at the request of the owner of the equity of redemption, and without the knowledge or consent of the assignee, caused the same to be canceled of record. Said owner then executed another mortgage on the premises to mortgagees who had full notice of the facts; they assigned the same to *bona fide* purchasers, who foreclosed the mortgage, and on the foreclosure sale the premises were purchased by the mortgagees in the name of an agent or representative, who conveyed the same to a person having full knowledge of the equities of the holder of the original mortgage. In an action to foreclose said mortgage, *held*, that it was a lien prior to the interest of said subsequent mortgagees or the grantee of their agent; that while, upon transfer of the subsequent mortgage to *bona fide* purchasers, it became in their hands a lien prior to that of plaintiff's mortgage, owing to the protection afforded by the recording act, upon purchase of the

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premises by one acting for the mortgagees, plaintiff's equity at once reattached.

Upon the trial defendant Mc.N., who executed the second mortgage, as a witness for plaintiff, was permitted to testify to conversations between him and one of his mortgagees, since deceased. This was objected to as incompetent under the Code of Civil Procedure (§ 829). *Held*, untenable, as plaintiff did not derive title to her mortgage from said mortgagor, and so the witness was not called in his own behalf or that of one who had succeeded to his interest.

(Argued April 22, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 13, 1888, which affirmed a judgment entered in favor of plaintiff, upon a decision of the court on a trial at Special Term.

This action was commenced to foreclose a mortgage, dated and recorded February 21, 1856, given by Jonah Miller to Abraham H. Impson to secure the payment of \$1,000, in one year, with interest, according to the condition of a bond accompanying the same.

Said bond and mortgage were duly assigned, for value, April 30, 1856, by Impson to Matilda C. Durland, April 1, 1861, by the latter to James Durland, and January 30, 1880, by the said James Durland to the plaintiff. None of said assignments were recorded. May 1, 1863, the lands in question were conveyed to Henry V. McNeal, who, in the deed, assumed and agreed to pay said mortgage, and from the date of his purchase until February 13, 1880, he did pay the interest thereon as it became due to the holder thereof. October 1, 1873, McNeal and wife, for value, mortgaged said premises to Joseph V. Whelan to secure the payment of \$2,000 and interest. This mortgage was duly recorded October 3, 1873. Subsequently, Whelan died, and the defendants Crosby are his executors. October 11, 1873, said Impson, at the request of McNeal, but without any consideration, and without the knowledge or consent of the assignees of said Impson mortgage, caused the same to be canceled of record. The plaintiff

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purchased for full value, and without notice that her mortgage had been satisfied, except such as is implied from the record, which she did not examine, and upon the assurance from McNeal that it was the first lien upon the lands covered thereby. Prior to January 22, 1876, said Henry V. McNeal and one William McNeal were copartners, and as such were indebted to Homer Ramsdell & Co., a firm composed of Homer Ramsdell and George W. and James A. Townsend, in the sum of \$5,000 upon a running account, to secure the payment of which, on that day, they executed to the persons comprising the latter firm, a mortgage covering, with other lands, those described in plaintiff's mortgage. This mortgage was recorded January 26, 1876, and before the same was given said Homer Ramsdell and George W. Townsend were each notified that the mortgage held by plaintiff was a subsisting and first lien upon the lands described therein. Subsequently, James A. Townsend retired from said firm and assigned his interest in said mortgage to his copartners, who thereupon organized a new firm under the same firm name, and as such held and owned said mortgage. Said assignment was dated February 4, 1876, and was recorded February 2, 1877. On the 1st of February, 1877, said Homer Ramsdell and George W. Townsend, for full value, assigned their bond and mortgage to James Mackin and others, as executors of one De Wint, and guaranteed the payment thereof. Said executors accepted said assignment, which was recorded February 2, 1877, without actual notice of the satisfaction of plaintiff's mortgage and without examination of the records in the county clerk's office. Before the commencement of this action the surviving executors of De Wint commenced an action, to which the plaintiff herein was not made a party, to foreclose their mortgage, and the usual judgment of foreclosure was, without the knowledge of the plaintiff, perfected therein on the 20th of June, 1881, with the ordinary provision for judgment for deficiency against said Henry V. McNeal, William McNeal and Homer Ramsdell, individually, and against the executors, as such, of

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said George W. Townsend, who had in the meantime died. This action was commenced May 12, 1881, against all of the present defendants except Homer Ramsdell, the executors of George W. Townsend, James A. P. Ramsdell and William E. Carvey, to cancel the satisfaction of plaintiff's mortgage, and to establish the lien thereof as prior to that of the defendants. A notice of pendency was filed therein May 14, 1881. Said action resulted in a decree that the lien of the mortgage held by the executors of De Wint was prior to that of plaintiff's mortgage, but that the lien of the mortgage held by the executors of Whelan was "subject and subsequent to the lien of plaintiff's mortgage and prior to the lien" of any defendant in the action; that the satisfaction of plaintiff's mortgage was null and void, and that the same should be canceled of record. The complaint was dismissed as to the executors of De Wint. The plaintiff appealed from that part of the judgment which dismissed the complaint, but the General Term affirmed it. Upon a further appeal, however, the Court of Appeals modified the judgment by directing that the plaintiff, upon paying the amount due to the executors of De Wint on their judgment of foreclosure and the costs of this action, should be subrogated to all their rights under their said judgment, bond, mortgage and the guaranty of Homer Ramsdell & Co., and directing said executors, "on said payment being made within ninety days," to assign to the plaintiff their judgment, bond, mortgage and guaranty. Thereupon, the plaintiff paid the costs and tendered the remainder required to be paid, but the executors of De Wint declined to accept such payment, or to make the transfer, because, pending said appeals, their decree of foreclosure had been enforced by a sale, and the said Homer Ramsdell and the executors of his deceased partner had paid, in accordance with said guaranty, the amount remaining unpaid upon said bond, mortgage and judgment. At said sale the premises described in plaintiff's mortgage were struck off to one James A. P. Ramsdell for the sum of \$50, but he was not present at the sale, and neither authorized

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nor paid said bid, which was made by the direction of said guarantors and for their benefit. The referee who conducted the sale, without receiving the amount of said bid from anyone, executed a deed to said James A. P. Ramsdell, who subsequently conveyed said premises to the defendant William E. Carvey. The negotiations which led to such purchase by Carvey were had by him with the representatives of said guarantors, who received the consideration therefor, and indemnified said Carvey from loss by reason of the claim of the plaintiff. Prior to said purchase Carvey was fully informed of the pendency of this action and of the existence of plaintiff's mortgage and of her claim to priority.

The plaintiff having filed a supplemental complaint, with proper allegations, making Ramsdell, Townsend's executors and Carvey parties, the action was tried and the court at Special Term found, among others, the foregoing facts, and as a conclusion of law, that the mortgage of the plaintiff was a valid and subsisting lien upon the lands in question, prior to the interest of any of the defendants, and that she was entitled to judgment of foreclosure and sale against all of the defendants. Judgment was entered accordingly, which upon appeal was affirmed by the General Term.

E. Countryman for appellants. The extension of credit upon the debt from McNeal to Ramsdell, by means of the mortgage and the goods obtained at the time, was a parting with value. (*Burns v. Rowland*, 40 Barb. 369; *Pratt v. Coman*, 37 N. Y. 443; *Bacon v. Van Schoonhoven*, 87 id. 446.) The purchaser at a foreclosure sale occupies the same position as to priority of liens on the property that the mortgagee held. (Jones on Mort. § 1654; *Davis v. Conn. Mut. L. Ins. Co.*, 84 Ill. 508; Code of Pro. § 632; *Mount v. Manhattan Co.*, 43 N. J. Eq. 25.) A purchaser from one who is protected by the recording act against a prior unrecorded mortgage, is himself protected, notwithstanding he purchases while having actual notice of such unrecorded mortgage. (*Lacustrine Fer. Co. v. Lake G. & F. Co.*, 82 N. Y. 476, 483; *Wood v. Chapin*,

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3 Kern. 509; *Griffiths v. Griffiths*, 9 Paige, 315; *Rector v. Mack*, 93 N. Y. 491.) The sale under the Mackin judgment had the same effect as it would have had had an entire stranger, without knowledge of Mrs. Clark's mortgage, been the purchaser. (*Rector v. Mack*, 93 N. Y. 491, 494.) The plaintiff's position as to the executors of De Wint was that of a subsequent lienor, and a payment by her to them, as holders of a prior mortgage, would have been a redemption of the mortgage, and would have canceled the mortgage debt and discharged the guaranty. (*Ellsworth v. Lockwood*, 42 N. Y. 97; *Frost v. Yonkers Sav. Bk.*, 70 id. 553; Baylies on Sureties, 4.) The rule concerning commercial paper, choses in action, or personal property of any description, not being prescribed by any statute, but depending upon principles of commercial law or general equity, has no application to conveyances of real estate, as affected by the recording act. (*Webster v. Van Steenburgh*, 46 Barb. 211; *Wood v. Chapin*, 3 Kern. 509.) The testimony of Henry V. McNeal and William McNeal of conversations between themselves and George W. Townsend, now deceased, was inadmissible under section 829 of the Code. (*Foot v. Beecher*, 78 N. Y. 155.)

Henry Bacon for respondent. Plaintiff has, and can claim, no better rights than her assignor had; nor can she be deprived of any of the rights which he possessed. (*Crane v. Turner*, 67 N. Y. 437, 440; *Trustees of Union College v. Wheeler*, 61 id. 88; *Decker v. Boice*, 83 id. 215; *Shafer v. Reilly*, 50 id. 61; *Green v. Warnick*, 64 id. 220; *Delancey v. Stearns*, 66 id. 157; *Young v. Guy*, 87 id. 457, 462; *Chance v. Isaacs*, 5 Paige, 592; *Patterson v. Brewster*, 4 Edw. 364.) This action is well brought to have a judgment declaring the satisfaction piece and the record of it null and void and directing their cancellation. (*McHenry v. Hazard*, 45 N. Y. 580, 583; Code Civil Pro. § 1632; *Harrison v. Simmons*, 3 Edw. Ch. 394, 395; *Hayes v. Thomas*, 56 N. Y. 521.) The effect of omitting to make the holders of the Impson mortgage parties, whether their liens are prior or subsequent to the action to

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foreclose the Ramsdell mortgage, is to leave its lien undisturbed and the right to foreclose it unaffected. Actual notice is equivalent to the notice arising from the record, and a party taking conveyance or mortgage with actual notice of an existing lien is not protected by the recording acts. (2 R. S. chap. 3, § 1; *Jackson v. Burgott*, 10 Johns. 457; *Butler v. Viele*, 44 Barb. 166.) If the mortgage was given as payment, the mortgagees are not within the protection of the recording act. (*Dickinson v. Fillinghurst*, 4 Paige, 215; *Weaver v. Barden*, 49 N. Y. 286.) If given as collateral security, the mortgagees are not within the protection of the recording act because there is no proof of an express extension of the time of payment. (*Wood v. Robinson*, 22 N. Y. 564; *Carey v. White*, 52 id. 138; *Young v. Guy*, 87 id. 457.) The fact that Ramsdell & Co. paid on account of their guaranty the balance due to Mackin and others, trustees, does not add anything to the extent of the rights and interests of the former. (Story's Eq. Jur. § 410; Daniel on Negotiable Inst. § 805; *Quinn v. Fuller*, 7 Cush. 224; *Shutt v. Large*, 6 Barb. 373, 380; *Knick. Life Ins. Co. v. Nelson*, 78 N. Y. 137.)

VANN, J. The lien of plaintiff's mortgage was prior to that of the mortgage of Ramsdell & Co., before they assigned it to a *bona fide* purchaser, because they accepted the latter without actual notice of the existence of the former. But after the purchase of the Ramsdell mortgage by the executors of De Wint, in good faith and for full value, it became, in their hands, prior in lien to that of plaintiff's mortgage, owing to the protection afforded by the recording act. Upon the former appeal this court sought to protect the equity of plaintiff as against Ramsdell & Co. by permitting her to acquire the rights which the executors of De Wint had obtained by their purchase, including the guaranty contained in the assignment of the Ramsdell mortgage. (*Clarke v. Mackin*, 95 N. Y. 346.) Prior to the judgment of this court, however, the land in question had been sold under the decree based upon the Ramsdell mortgage, and Ramsdell & Co., had discharged their guaranty by payment of

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the deficiency. Otherwise the plaintiff could have acquired the Ramsdell mortgage and could have been subrogated to the rights of the holders thereof. If a sale had been made, she would have been entitled to have her mortgage first paid out of the proceeds, and after application of the residue upon the other mortgage could have collected from Ramsdell & Co. any deficiency then remaining. In order to accomplish the same result in the only way then available, a supplemental complaint was filed and the parties who were necessary, owing to the change of circumstances, were brought in. Upon the trial of the new issues, the court found that Ramsdell & Co. were virtually the purchasers at the foreclosure sale, and that the defendant Carvey took title from their representative upon being indemnified by them against loss by reason of plaintiff's claim to priority, of which claim he was fully informed. The situation is, therefore, the same as if Ramsdell & Co. now owned the premises through a purchase in their own names under the decree of foreclosure. The question presented is, whether such a purchase by them, under all the circumstances, would give them a title free from the lien of plaintiff's mortgage. The appellants claim that it would, upon the ground that a purchase from one who is protected by the recording act against a prior unrecorded mortgage is himself protected, even if he had actual notice at the time of his purchase. It is clear that a sale to anyone except Ramsdell & Co., or their representative, would have destroyed the lien of plaintiff's mortgage. But a sale to Ramsdell & Co., or to one who purchased for them, would not have this effect. As the lien of their mortgage, while they held it, was subject to that of the plaintiff's, so their title acquired under that mortgage would be subject to the same lien. By selling the mortgage they did not destroy plaintiff's equity, but simply prevented her from asserting it against a *bona fide* purchaser. If they had afterward bought the mortgage, the equity would have at once re-attached, and when they bought the land upon a sale under the mortgage, the equity of plaintiff's lien forthwith revived.

It is a familiar principle that where one purchases with full

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notice of the equitable claim of another to the same property, he will not be permitted to protect himself against that claim, but his own title will be postponed and made subservient to it. This is upon the ground that he is guilty of constructive fraud. If, however, he transfers to a *bona fide* purchaser, the latter not only takes a good title, but can transfer a good title even to one who purchases with notice of the facts, as otherwise the *bona fide* purchaser could not get the market-value of his property. To this general rule, however, there is an exception. The principle of protection does not extend to the one guilty of the constructive fraud, even if he purchases from a *bona fide* purchaser.

The rule as stated in Story's *Equity Jurisprudence* (§ 410) is, "that it is wholly immaterial of what nature the equity is, whether it is a lien or an incumbrance, or a trust or any other claim; for a *bona fide* purchaser of an estate, for a valuable consideration, purges away the equity from the estate, in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the violation of his trust and meditated fraud. But if the estate becomes revested in him, the original equity will re-attach to it in his hands."

The rule and the exception are laid down in Pomeroy's *Equity Jurisprudence* (§ 754), as follows: "If the title to land, having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value and without notice, it is at once freed from these equities; he obtains a valid title, and, with a single exception, the full power of disposition. This exception is, that such a title cannot be conveyed, free from the prior equities, back to a former owner who was charged with notice."

The authorities are uniform upon the subject, so far, at least, as they apply to the facts of this case. (*Schutt v. Large*, 6 Barb. 373, 380; *Ely v. Wilcox*, 26 Wis. 91; *Church v. Ruland*, 64 Pa. 432; *Quinn v. Fuller*, 7 Cush. 224; *Kost v. Bender*, 25 Mich. 515; Daniel on *Negotiable Inst.* § 805.)

The appellants insist that the witnesses McNeal should not

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have been permitted to testify to conversations between themselves and George W. Townsend, deceased, upon the ground that such evidence was inadmissible under section 829 of the Code of Civil Procedure.

We think the evidence was competent. The plaintiff did not derive her title to the mortgage through either of the McNeals. Neither of them ever owned it. They were not called in their own behalf, nor in behalf of a person who had succeeded to their interest. The action could not have so resulted as to add to or take from their liability. One of them was not a party to the action, and the other interposed no defense.

The judgment should be affirmed, with costs.

All concur, except BROWN, J., not sitting.

Judgment affirmed.

FLORIAN J. BOHN, by Guardian, etc., Appellant, v. FREDERICK C. HAVEMEYER et al., Respondents.

In an action to recover damages for injuries alleged to have been caused by defendants' negligence these facts appeared: Plaintiff was employed as shoveler in defendants' sugar refinery, upon the second floor of which there are bins for the refined sugar. In the bottom of each bin is an orifice about two feet square, through which the sugar falls into a packer. It is the duty of the shovellers, among other things, when the discharging orifice of a bin becomes clogged, to open it by running a pole down through and loosening the sugar. Plaintiff had been engaged in this work, and was acquainted with the construction of the bins and the method of discharging sugar. The orifice of a bin became clogged and plaintiff entered with a co-employe to open it. The pole not being long enough to effect the purpose, they dug down into the sugar far enough to reach the orifice with the pole. On opening it a sudden and unusual subsidence of the sugar occurred and plaintiff was drawn down and surrounded by sugar; his co-employes threw a rope around his body and pulled him out, whereby he received the injuries complained of. It was clearly proved that the bins had long been in use, and no witness was called to show that they were defectively constructed, out of repair, or that they might have been improved. The only evidence to show defendants' knowledge of the danger was that of a former employe,

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who testified that it was necessary in working to go on to the sugar, and that it was liable to run in upon a person thus employed; that it happened twice to him, once the foreman being present. The questions of defendants' negligence and plaintiff's contributory negligence were submitted to the jury, who found for the defendants. *Held*, no error for which plaintiff could complain.

It seems the evidence was insufficient to justify the submission of the question of defendants' negligence to the jury.

Reported below, 46 Hun, 557.

(Argued April 28, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term in the second judicial department, entered upon an order made December 13, 1887, which affirmed a judgment in favor of defendants, entered upon a verdict.

The nature of the action and the facts are sufficiently stated in the opinion.

Abraham H. Dailey for appellant. If the imperfections of the bin contributed to the accident, and the plaintiff is blameless, the master is liable. (*Cone v. D. L. & W. R. R. Co.*, 81 N. Y. 206.) It was negligence in the foreman not to notify the plaintiff of the danger attending that particular service, and for that kind of negligence the master is liable. (Whart. on Neg. §§ 210, 211; *Clark v. Holmes*, 7 H. & N. 937, 943.)

Joseph A. Burr, Jr., for respondent.

FOLLETT, Ch. J. For several years before the accident, which is the subject of this action, the defendants had owned and operated a sugar refinery at Brooklyn, N. Y., in which the plaintiff was employed as a shoveler. Upon the second floor of the refinery are bins about ten feet long, five feet wide and thirteen feet deep, into which refined sugar is discharged from the mill on the third floor. A hole about two feet square is cut in the bottom of each bin through which sugar falls into a packer, which presses it into barrels. The action of the packer is automatic. When a barrel is filled a valve closes in the packer and stops the flow of sugar from

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the bin ; and when the filled barrel is replaced by an empty one, the valve opens and permits sufficient sugar to flow from the bin into the packer to fill the barrel. This operation is repeated until all of the sugar in the bin is barreled. It is the duty of the shovelers when the sugar is low in the bin, to shovel it towards and into the discharging orifice ; and when the bin is so full that shoveling is unnecessary, it is their duty to keep the discharging orifice open. The plaintiff had been engaged in this work previous to the day of his injury and was acquainted with the construction of the bins and the method of discharging sugar from them.

Occasionally the discharging orifice in the bottom of the bin becomes clogged, and then it is the duty of the shovelers to open it by running a pole down through and loosening the sugar about the orifice. On the occasion of the accident in question, the discharging orifice became clogged and the plaintiff entered the bin with a co-employe to open it, but the depth of the sugar was so great that the pole used was not long enough to effect the purpose. A shovel was procured and they dug down into the sugar far enough to enable them to reach the orifice with the pole. After some difficulty they accomplished their purpose, and thereupon a sudden and unusual subsidence of sugar occurred, drawing the plaintiff and his co-employe downwards. The plaintiff's companion sank into the sugar, and that which was above him came down upon and suffocated him. The plaintiff, who evidently was not standing in the lowest part of the pit, was not covered like his companion, but was surrounded by sugar to a point somewhat above his waist. When in this situation his co-employes threw a rope around his body in the region of his chest and pulled him out, by which means he alleges his chest and lungs were injured. It is supposed that the sugar became caked, forming a large dome shaped crust over the discharging orifice, and that all the sugar underneath it passed through the packer into the barrels, leaving a cavity, and that the breaking of the crust caused this unusual subsidence, which, together with the fact that the shovelers were in the

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pit which they had dug, was the immediate cause of their being overwhelmed.

The plaintiff, for the grounds of his action, alleged: (1), That the bin was improperly and negligently constructed; and (2), that the defendants knowingly exposed the plaintiff to a danger unknown to him, but well known to them. In addition to a general denial, the defendants alleged that the plaintiff and his co-employe negligently contributed to the accident by permitting the crust to form, and by digging and entering a pit directly over the discharging orifice for the purpose of reaching and breaking the crust with the pole.

The undisputed evidence is that the bins had long been in use, and no witness was called to show that they were defectively constructed, out of repair or that they might have been improved. The only evidence in support of the plaintiff's second allegation was given by Neigel, a former employe in the refinery, who testified: "It is necessary to go onto the sugar or it would stop; in doing so in working there the sugar is liable to run in upon a person so employed; it happened twice to me; * * * once the foreman was present when this thing occurred; we was up on the other floor looking down at it, but a man was near me; he lent his hand or else I would have been drawn down myself; * * * when I was caught in the sugar I don't know whether the foreman, looking down from the floor above, was the one who lost his life on that occasion, or another one; I went in about waist high; the bottom of the bin was perfectly flat." This witness does not state when these occurrences happened, or who were present. It is apparent to anyone that sugar while being drawn from a bin would run and surround, to a greater or less extent, a person at work in the bin. The plaintiff had the same means of knowing the danger as the defendants, and the evidence of Neigel was insufficient to sustain a finding that defendants knowingly exposed the plaintiff to a danger unknown to him, but well known to them.

Whether the defendants were negligent, and whether the plaintiff negligently contributed to his injury, were submitted

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to the jury as questions of fact, and found for the defendants, which verdict the trial court refused to set aside.

It is urged in behalf of the appellant that the court erred in giving and refusing certain instructions to the jury, and also in ruling upon the admissibility of evidence relating to the question of damages.

After an examination of the evidence we are satisfied that it is insufficient to justify the submission to the jury of the question of defendants' negligence, and for this reason the exceptions to the charge and to the rulings upon the question of damages are unavailing.

Finding no available exceptions to the admission or exclusion of evidence relating to defendants' negligence, or to the plaintiff's contributory negligence, the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

SAMUEL C. ROOT, Respondent, v. THE LONG ISLAND RAILROAD COMPANY, Appellant.

114 300
143 278

A railroad corporation may not make an unreasonable or unjust discrimination between its customers in its freight charges.

The question as to whether such discrimination has been made is ordinarily one of fact.

Defendant and one Q. entered into a written contract, which provided that the latter should build, upon certain lands belonging to the former, a dock and erect thereon a pocket for holding and storing coal. Defendant was to have the use of the south side of the dock and of thirty feet of the shore end and the right to use the other portions when not required by Q. In consideration thereof defendant agreed to transport in its cars all the coal in car loads offered for transportation by Q. for the term of ten years at a rebate of fifteen cents per ton from the regular tariff rates, Q. to load the coal, and it was understood he was to ship large quantities. At the termination of the contract the dock and structures were to be appraised and the value thereof, less \$2,000 advanced by defendant, paid to Q. The dock and coal-pocket were constructed, pursuant to this agreement, at an expense of \$17,000, and coal in large quantities shipped over defendant's road by Q. or his assignee, under the contract. In an

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action to recover the rebate agreed upon, defendant claimed that the contract was against public policy and, therefore, illegal and void. There were no findings or request to find, as matter of fact, that there was any unjust discrimination. *Held*, that this could not be found, as matter of law, and in the absence of such a finding the action was not maintainable.

(Argued April 22, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made the day of July, 1886, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts are sufficiently stated in the opinion.

Edward E. Sprague for appellant. The agreement for a rebate is void as against public policy. (*In re N. F. & W. R. R. Co.*, 108 N. Y. 375; *People v. N. Y. C. R. R. Co.*, 28 Hun, 545; *Keeney v. G. T. R. R. Co.*, 47 N. Y. 525; *Tierney v. N. Y. C. & H. R. R. R. Co.*, 76 id. 305; *Atwater v. D., L. & W. R. R. Co.*, 48 N. J. L. 55; *Messenger v. P. R. R. Co.*, 36 id. 407; *C. & A. R. R. Co. v. People*, 67 Ill. 11; *McDuffie v. R. R. Co.*, 52 N. H. 447; *N. E. E. Co. v. M. C. R. R. Co.*, 57 Me. 188; *Samuels v. L. & N. R. R. Co.*, 30 Am. and Eng. Rep. 79; *Hays v. Pa. Co.*, 6 id. 594; *D. & N. O. R. R. Co. v. A., T. & S. F. R. R. Co.*, 9 id. 374; *Vincent v. C. & A. R. R. Co.*, 49 Ill. 33; *Skipper v. P. R. R. Co.*, 47 Penn. St. 338; *Rhodes v. N. P. R. R. Co.*, 21 Am. and Eng. Rep. 31; *B. & O. R. R. Co. v. A. Ex. Co.*, 18 id. 461; *A., T. & S. F. R. R. Co. v. D. & N. O. R. R. Co.*, 110 U. S. 667; *R. R. Co. v. Forsaith*, 59 N. H. 122.) Illegality is a good defense as between the parties to the contract. (*Arnot v. P. E. Coal Co.*, 68 N. Y. 558; *Knowlton v. C. & E. S. Co.*, 57 N. Y. 518; *Messenger v. P. R. R. Co.*, 36 N. J. L. 407.)

Francis Lynde Stetson for respondent. The defendant's agreement to carry coal for plaintiff's assignor for fifteen cents a ton less than for customers other than the Brooklyn water-works

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was valid and enforceable against defendant, notwithstanding the alleged defense of a contrary public policy. (*Kilmer v. N. Y. C. & H. R. R. Co.*, 100 N. Y. 395, 402; *Baxendale v. E. R. Co.*, 4 C. B. [N. S.] 63; *Coggs v. Bernard*, 1 Smith's L. C. 284; *F. R. R. Co. v. Gage*, 12 Gray, 393; *Menacho v. Ward*, 27 Fed. Rep. 529; 23 Blatch. 502; 34 Alb. L. Jour. 44; *Johnson v. P. & P. R. R. Co.*, 16 Fla. 623, 668; 26 Am. Rep. 731; 1 Chitty on Contracts [11th Am. ed.] 687; *Oxlade v. Railway Co.*, 1 C. B. [N. S.] 454; *In re Ransome*, Id. 437; *Nicholsen v. Railway Co.*, 5 id. 366; *In re Jones*, 3 id. 718; *Robinson v. Railway Co.*, 35 L. J., C. P. 123; *Pickford v. Railway Co.*, 10. M. & W. 122; *Messenger v. P. R. R. Co.*, 36 N. J. L. 407, 410; 18 Am. Rep. 754, 759; *Atwater v. D., L. & W. R. R. Co.*, 4 East. Rep. 189.) The approvals by defendant of the several assignments to plaintiff and his associates may be considered as binding the defendant, as an estoppel against a denial of plaintiff's right to enjoy all the apparent benefits of the contract. (*L'Amoreaux v. Vischer*, 2 N. Y. 278; *Wolfe v. S. F. Ins. Co.*, 39 id. 49; *Townsend v. Scholey*, 42 id. 18; *E. C. Bank v. Roop*, 48 id. 292; *Weyh v. Bolan*, 85 id. 394, 397; *Fish v. Cotnett*, 44 id. 538; *Carpenter v. O'Dougherty*, 2 T. & C. 427; *Watson v. McLaren*, 19 Wend. 557; *Petrie v. Feeter*, 21 id. 172; *Tylee v. Yates*, 3 Barb. 222; *Wendel v. Van Rensselaer*, 1 Johns. Ch. 344; *Edgerton v. Thomas*, 9 N. Y. 40.) A new contract may be considered to have been effected by defendant's approval of the several assignments to plaintiff of the original contract. (*L'Amoreaux v. Vischer*, 2 N. Y. 278; *Shearman v. N. F. Ins. Co.*, 2 Sweeney, 476; 46 N. Y. 426, 531; 17 id. 427.)

HAIGHT, J. In June, 1876, the defendant and one Quintard entered into a written contract which, among other things, provided that Quintard should build at Long Island City upon the lands of the defendant a dock two hundred and fifty feet long and forty feet wide, and erect thereon a pocket for holding and storing coal according to certain plans and specifications annexed. The defendant was to have the use of the south side

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of the dock, and also of thirty feet of the shore end, and the right to use the other portions thereof when not required by Quintard. In consideration therefor the defendant agreed with Quintard to transport in its cars all the coal in car loads offered for transportation by him at a rebate of fifteen cents per ton, of twenty-two hundred and forty pounds, from the regular tariff rates for coal transported by the defendant from time to time, except in the case of the coal carried for the Brooklyn Water-Works Company, with which company the defendant reserved the right to make a special rate which should not be considered "the regular tariff rate." The defendant also agreed with Quintard to provide him with certain yard room and office room free of rent, and the contract was to continue for the term of ten years, and at the termination of the contract the dock and structures were to be appraised, and the value thereof, less the sum of \$2,000 advanced by the defendant, to be paid to Quintard. Pursuant to this agreement the dock and coal-pocket were constructed at an expense of \$17,000, and coal in large quantities was shipped over the defendant's road by Quintard or his assignee under the contract, and it is for the rebate of fifteen cents per ton upon the coal so shipped that this action was brought.

The defense is that the contract was against public policy, and was, therefore, illegal and void. The defendant is a railroad corporation organized under the laws of the state, and was, therefore, a common carrier of passengers and freight, and was subject to the duties and liabilities of such. These duties and liabilities have often been the subject of judicial consideration in the different states of the union. In Illinois it has been held that a railroad corporation, although permitted to establish its rates for transportation, must do so without injurious discrimination to individuals; that its charges must be reasonable. (*C. & A. R. R. Co. v. People ex rel. Koerner*, 67 Ill. 11; *Vincent v. C. & A. R. R. Co.*, 49 id. 33.) In Ohio it was held that, where a railroad company gave a lower rate to a favored shipper with the intent to give such shipper an exclusive monopoly, thus affecting the business and destroy-

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ing the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances, (*Scofield v. R. Co.*, 43 Ohio St. 571.) In New Jersey it has been held that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than it would carry under the same conditions for others, is void as creating an illegal preference; that common carriers are public agents transacting their business under an obligation to observe equality towards every member of the community; to serve all persons alike without giving unjust or unreasonable advantages by way of facilities for the carriage, or rates for the transportation of goods. (*Messenger v. P. R. R. Co.*, 36 N. J. L. 407; *State ex rel. Atwater v. D., L. & W. R. R. Co.*, 48 id. 55.) In New Hampshire it has been held that a railroad is bound to carry, at reasonable rates, commodities for all persons who offer them as early as means will allow; that it cannot directly exercise unreasonable discrimination as to whom and what it will carry; that it cannot impose unreasonable or unequal terms, facilities or accommodations. (*McDuffee v. P. & R. R. R. Co.*, 52 N. H. 430.) To similar effect are cases in other states. (*N. E. Ex. Co. v. M. C. R. R. Co.*, 57 Me. 188; *Shipper v. P. R. R. Co.*, 47 Penn. St. 338; *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393; *Menacho v. Ward*, 27 Fed. Rep. 529.)

In New York the authorities are exceedingly meager. The question was considered to some extent in the case of *Killmer v. New York Central & Hudson River Railroad Company* (100 N. Y. 395), in which it was held that the reservation in the general act of the power of the legislature to regulate and reduce charges, where the earnings exceeded ten per cent of the capital actually expended, did not relieve the company from its common-law duty as a common carrier; that the question, as to what was a reasonable sum for the transportation of goods on the lines of a railroad in a given case is a complex question into which enters many elements for consideration.

In determining the duty of a common carrier we must be reasonable and just. The carrier should be permitted to charge reasonable compensation for the goods transported. He should

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not, however, be permitted to unreasonably or unjustly discriminate against other individuals to the injury of their business where the conditions are equal. So far as is reasonable all should be treated alike; but we are aware that absolute equality cannot in all cases be required, for circumstances and conditions may make it impossible or unjust to the carrier. The carrier may be able to carry freight over a long distance at a less sum than he could for a short distance. He may be able to carry a large quantity at a less rate than he could a smaller quantity. The facilities for loading and unloading may be different in different places, and the expenses may be greater in some places than in others. Numerous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted to take these circumstances into consideration in determining the rate or amount of his compensation. His charges must, therefore, be reasonable, and he must not unjustly discriminate against others, and in determining what would amount to unjust discrimination all the facts and circumstances must be taken into consideration. This raises a question of fact which must ordinarily be determined by the trial court.

The question as to whether there was unjust discrimination embraced in the provisions of the contract does not appear to have been determined by the referee, for no finding of fact appears upon that subject. Neither does it appear that he was requested to find upon that question, and, consequently, there is no exception to the refusal to find thereon. Unless, therefore, we can determine the question as one of law, there is nothing upon this subject presented for review in this court.

Is the provision of the contract, therefore, providing for a rebate of fifteen cents per ton from the regular tariff rates an unjust discrimination as a matter of law? Had this provision stood alone, unqualified by other provisions, without the circumstances under which it was executed, explaining the necessity therefor, we should be inclined to the opinion that it did

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provide for an unjust discrimination, but, upon referring to the contract, we see that the rebate was agreed to be paid in consideration for the dock and coal-pocket, which was to be constructed upon the defendant's premises at an expense of \$17,000, in part for the use and convenience of the defendant. Quintard was to load all the cars with the coal that was to be transported. It was understood that a large quantity of coal was to be shipped over defendant's line, thus increasing the business and income of the company. The facilities which Quintard was to provide for the loading of the coal, his services in loading the cars, the large quantities which he was to ship, in connection with the large sums of money that he had expended in the erection of the dock, in part for the use and accommodation of the defendant, are facts which tend to explain the provision of the contract complained of, and render it a question of fact for the determination of the trial court, as to whether or not the rebate, under the circumstances of this case, amounted to an unjust discrimination, to the injury and prejudice of others.

Therefore, in this case, the question is one of fact, and not of law, and inasmuch as the discrimination has not been found to be unjust or unreasonable, the judgment cannot be disturbed.

The defendant, in its answer, alleged that the rebates accruing between the 1st day of January and the 31st day of October, 1879, were waived by the parties. The referee, upon request, refused to find that this was the case, and an exception was taken to such refusal.

Had we been sitting as a trial court, it is possible we should have reached a different conclusion, but on review the evidence is too meagre and indefinite to justify a reversal.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

MEHITABLE G. CRAIN, Respondent, *v.* JOHN WRIGHT,
Appellant.

114 307
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The will of W. gave fifty acres of land to his widow "to have and to hold for her benefit and support." In an action of ejectment, brought by a grantee of the widow, held, that no intent to pass a less estate than a fee could "be necessarily implied in the terms" of the devise; and that the widow took a fee under the provision of the Revised Statutes (1 R. S. 748, § 1), providing that the term "heirs," or other words of inheritance, shall not be requisite to convey a fee, and that a devise will pass all the estate of the testator "unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied."

Terry v. Wiggins (47 N. Y. 512); *Henderson v. Blackburn* (104 Ill. 22); *Payne v. Barnes* (100 Mass. 470) distinguished.

It appeared that plaintiff's deed was delivered to her husband in trust for her benefit by the grantor, with a request that it should be kept secret until her death. Plaintiff was in the house when the deed was prepared and executed and was present at a conversation shortly before when the grantor announced her intention to convey the property to plaintiff. Held, the circumstances authorized the presumption that the deed was delivered with the intent that it should take effect as a present conveyance and that it was accepted by plaintiff, and this having been found by the jury that it became operative as a conveyance.

Mem. of decision below, 36 Hun, 74.

(Argued April 26, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 23, 1885, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This was an action of ejectment to recover the possession of thirty acres of land in the town of Hartland, county of Niagara. The defense was a general denial.

The parties are the children of one John Wright, who died April 2, 1861, leaving a last will and testament, the material portion of which is as follows, viz.:

"*First.* It is my will that the whole of my estate, landed and personal, remain after my decease in the hands of legal executors one year, to be used by them in paying my just

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debts and for the support of the family during said term of time at their discretion.

"*Second.* Unto my dear wife Anna, I give and bequeath fifty acres of land, off the north end of my farm, to have and to hold for her benefit and support. And I also give to my aforesaid wife Anna all my household furniture, beds and bedding.

"*Third.* Unto my son John Wright, Jr., I give and bequeath all the remainder of my property after paying the following legacies," naming them.

The plaintiff claims that on the 7th of June, 1873, said Anna Wright conveyed to her the premises in question, which are a part of the fifty acres mentioned in the will. The defendant claims the same premises under the residuary clause of said will, as well as by the will of said Anna Wright, dated April 9, 1872, and admitted to probate May 9, 1874.

George C. Greene for appellant. Anna Wright took only a life estate in the land under the will of her husband John Wright, deceased, and the defendant John Wright, by virtue of the will, took the remainder and was seized in fee thereof. (*Terry v. Wiggins*, 47 N. Y. 512, 514, 516; *Henderson v. Blackburn*, 104 Ill. 227; *Payne v. Barnes*, 100 Mass. 470; *Smith v. Van Ostrand*, 64 N. Y. 278, 284; *Spencer v. Strait*, 38 Hun, 228.) The plaintiff acquired no title to the lands in question, by virtue of the deed from Anna Wright. (*Comm. v. Jackson*, 10 Bush. 424; *Tuttle v. Turner*, 28 Texas, 773; *Hathaway v. Payne*, 34 N. Y. 92-106; 2 Mass. 447; *Stillwell v. Hubbard*, 20 Wend. 44, 46; *In re Dieze*, 50 N. Y. 88, 93; *Taft v. Taft*, 26 N. W. Rep. 426; 33 Alb. L. Jour. 264; *Wellborn v. Weaver*, 17 Ga. 257; *Naldred v. Gilham*, 1 P. Wms. 577; *Uniacke v. Giles*, 2 Moll. 257; *Cecil v. Butcher*, 2 Jac. & W. 565; *Gilmore v. Whitesides*, Dud. Eq. [S. C.] 14; *Cook v. Brown*, 34 N. H. 460; *Stinson v. Anderson*, 96 Ill. 373; *Prutsman v. Baker*, 30 Wis. 644; *Baker v. Haskell*, 47 N. H. 479; *Brown v. Brown*, 66 Me. 316; N. E. Rep. 260, note 3; *People v. Bostwick*, 32 N. Y. 445, 448.)

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Richard Crowley for respondent. The term "heirs" or other words of inheritance are not necessary to create or convey a fee since the adoption of the present Revised Statutes. (2 R. S. tit. 5, chap. 1, § 1; *Taggart v. Murray*, 53 N. Y. 233; *Campbell v. Beaumont*, 91 id. 464.) The will created a particular estate in Anna Wright in fee simple, and no subsequent clause, by implication or expressly, created a different estate. (*Westcott v. Cady*, 5 Johns. Ch. 348; *Popham v. Banfield*, 1 Salk. 236.) No remainder being limited upon it, it became a fee simple absolute. (*In re Kirk v. Richardson*, 32 Hun, 434.) The delivery of the deed to her husband was in trust for her benefit and vested the title in her, subject to be divested by her dissent. The trust was beneficial and vested title in her unless she expressly disaffirmed it. Being for her benefit, her assent is to be presumed. (*Atkins v. Barwick*, 1 Strange, 165; *Berly v. Taylor*, 5 Hill, 581; *Sturtevant v. Arser*, 24 N. Y. 538; *Hutchings v. Miner*, 46 id. 456, 460; *Hathaway v. Payne*, 84 id. 92, 105, 112, 113; *Brooks v. Marbury*, 7 Wheat. 555; *Foster v. Mansfield*, 8 Metc. 414; *Belden v. Carter*, 4 Day, '66; *Wheelright v. Wheelright*, 2 Mass. 447; *Fisher v. Hall*, 41 N. Y. 416; *Tooley v. Dibble*, 2 Hill, 641.)

VANN, J. The title of the plaintiff depends upon a conveyance to her from her mother Anna Wright. The title of Anna Wright depended upon the will of her deceased husband, John Wright, by which he devised the lands in question to her "to have and to hold for her benefit and support." The appellant contends that by the addition of these words the devise was cut down to a life estate, and the case of *Terry v. Wiggins* (47 N. Y. 512) is cited in support of this position. In that case, however, the testator devised a piece of land to his wife "for her sole and absolute use and disposal," and also gave her all his other real and personal estate "for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, in part or in the whole, if she should require it or deem it expedient so to do."

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After her decease he gave to a religious society "whatever residue there may be of personal or real estate and effects." It was held that by the second devise the devisee took a life estate only, with a conditional power of disposal annexed, because the only necessity for two distinct devises was either to give different estates or to annex some condition to one devise which it was not intended should apply to the other. It is evident this must have been the design of the testator in that case, as otherwise there could have been nothing left for the residuary clause to operate upon. As the reasons governing that decision have no application to this case, we do not consider the authority analogous.

The Revised Statutes provide that the term "heirs," or other words of inheritance, shall not be requisite to create or convey an estate in fee, and that every grant or devise of real estate shall pass all the estate or interest of the grantor or testator, "unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of such grant." As such intent does not appear by express terms in the will of John Wright, unless it is necessarily to be implied therefrom, the construction should be against the appellant's contention. The statute requires that the intent must "necessarily" be implied, and hence, that it must be the only reasonable interpretation that is possible. We think that the words "for her benefit and support" indicate the reason for making the gift, rather than the intention of the testator to annex a condition or limitation to the gift. He gave her the land in order to provide her with the means of support, not simply by the use of the land itself, but by the use of the land or of its proceeds, when sold. Moreover, the premises were devised to her not only for her support, but for her benefit. The use of the word "benefit," in connection with a gift of property, is significant. It is consistent with a devise in fee, but inconsistent with the devise of a life estate. A gift to a person for his benefit means an absolute gift, and excludes the idea of a qualified or limited estate.

In *Campbell v. Beaumont* (91 N. Y. 464), the testator left

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all his property to his wife "to be enjoyed by her, for her sole use and benefit," and added that "in case of her decease, the same or such portion as may remain thereof, it is my will and desire that the same shall be received and enjoyed by her son Charles, * * * requesting him, at the same time, that he will use well and not wastefully squander the little property I have gained by long years of toil." It was held that the devisee took an absolute title with power to dispose of the whole estate. The court referring to the provision as to Charles, who was the son of the widow by a former husband, said: "It seems insufficient to limit the wife's estate or interest, and rather to have been intended to express the natural anticipation of the testator that his property, or some of it, would, as matter of course, go from the mother to her child, and his acquiescence in such devolution, coupled with a hope that what he had painfully acquired should not be wasted." If an intent to limit the estate could not, under the statute, be implied in that case, it is impossible that such an intent is necessarily to be implied in this case. No other authority has been cited which, in principle, so nearly resembles the case under consideration.

In *Henderson v. Blackburn* (104 Ill. 227) and *Payne v. Barnes* (100 Mass. 470), cited by the learned counsel for the appellant, there was an express limitation of the gift by the use of the words "during her lifetime" in the former, and "during her natural life" in the latter. In the absence of such express terms, and when the effort to qualify the estate depends wholly upon necessary implication, a strong and clear case is required to satisfy the statute. These views lead to the conclusion that the grantor of the plaintiff took an estate in fee, and that she had the absolute power of disposition by deed or will as she saw fit.

The appellant further contends that the deed from Anna Wright to the plaintiff was never delivered so as to become operative as a conveyance. This was a question of fact, and the jury found, upon sufficient evidence, and under proper instruction from the court, that the deed was delivered with the intent that it should take effect as a present conveyance

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of the land. The request of the grantor that it should be kept secret during her life from all who were not obliged to know of its existence, was simply to avoid the opportunity of the other heirs, and gave her no right to demand a return of the deed or to exercise any control over it. It did not postpone the operation of the instrument until after her death, nor convert the deed into a will. The circumstances warrant the presumption that the conveyance was accepted by the plaintiff, as it was delivered to her husband in trust for her benefit while she was living with him. She was in the house when the deed was prepared and executed, and was present at a conversation, shortly before, when the grantor announced her intention to convey the property to her. In the absence of proof of express disaffirmance, acceptance will be presumed from these facts. This question, however, is not raised by any request to go to the jury, nor by any exception.

We have examined the questions relating to the admission of evidence, and think they were properly disposed of by the trial court.

The judgment should be affirmed, with costs.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Judgment affirmed.

ROSE TOUSEY, Respondent, v. LEWIS ROBERTS, Appellant.

¹¹⁴ ₁₂₀ ³¹² ₄₇₂. An elevator in a building, for the carriage of persons, is not supposed to be a place of danger, to be approached with great caution; on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen or make a special examination.

In an action to recover damages for injuries alleged to have been caused by defendant's negligence, these facts appeared: Plaintiff's husband leased of defendant an apartment in an apartment-house owned by him in the city of New York. The usual mode of going to and from said apartment was by an elevator operated by defendant for the accommodation of the occupants. The door through which the elevator car was entered on the ground floor was so constructed that it could be opened by a person standing in the hallway. Plaintiff entered the hallway from the street between

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6 and 7 P. M.; there was no artificial light in the hallway; as she approached the elevator the door was thrown open by a boy who, plaintiff's witnesses testified, had frequently run the elevator. She stepped through the doorway and, as the car was above, she fell to the bottom of the shaft and was injured. *Held*, that a motion for a nonsuit was properly denied; and that the evidence justified a verdict for plaintiff.

The court, after it had stated to the jury that there was no evidence that the boy was employed by defendant, charged that, although he was not a servant, it might be a question for them whether defendant should not have exercised such supervision over the building as to make it impossible for the boy to do acts from which the tenant might have derived the impression that he was such a servant. *Held*, no error.

The case showed that defendant requested the court to charge six propositions set forth; it did not show what disposition was made of them. There was an exception "to each and every refusal of the court to charge each and every proposition requested by defendant's counsel." *Held*, that the exception was not available.

Reported below, 21 J. & S. 446.

(Argued April 26, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made July 2, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

The material facts are stated in the opinion.

Norman T. M. Melliss for appellant. The plaintiff was guilty of contributory negligence, as a matter of law, in stepping into the shaft under the circumstances, the hallway being light, the elevator making considerable noise in coming down and she not looking before she stepped in. (*Solomon v. Manhattan R. Co.*, 103 N. Y. 443; *Glendenning v. Sharp*, 22 Hun, 78; *Woodward v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 369; *Young v. N. Y., L. E. & W. R. R. Co.*, 107 id. 500; *Cahill v. Hilton*, 106 id. 512, 522.) It is undisputed that the boy who opened the door of the elevator shaft and thereby brought about the injury to the plaintiff was not in the employment of the defendant, nor had he been employed

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by anybody in behalf of the defendant. His act, therefore, was not the defendant's act. (*Stevens v. Armstrong*, 6 N. Y. 435; *Edwards v. Jones*, 67 How. Pr. 177.)

William H. Townley for respondent. The case was properly submitted to the jury. (*Dawson v. Sloan*, 49 Super. Ct. [J. & S.] 304; 100 N. Y. 620.) As a tenant plaintiff had a right to all the precautions as to the safety of the well-shaft which could be given to her. To open the door was to invite her to enter. (*Glushing v. Sharpe, Recr.*, 96 N. Y. 676.) It was negligence on the part of the landlord to suffer a state of things to exist which would leave the door of his elevator shaft in a condition to be opened from the outside by any boy or man who chose to. (*Althorff v. Wolfe*, 22 N. Y. 364.) Agency can be inferred from circumstances. Where one habitually acts, or is suffered to apparently act for another, or that other permits or acquiesces in such acts as to third parties, the proof of agency is sufficient. (*Althorff v. Wolf*, 22 N. Y. 364, 385; *Gleason v. Amsdell*, 9 Daly, 393.)

FOLLETT, Ch. J. In 1883, the defendant owned a house on West Fifty-sixth street in the city of New York, known as "The Winfield," which was divided into apartments. The plaintiff's husband had a written lease from the defendant of an apartment on the fourth floor, in which the plaintiff and her husband dwelt. The usual mode of going to and from this apartment was by an elevator which was operated by the defendant for the accommodation of the occupants of the building. The elevator shaft extended seven feet below the ground floor. The door through which the car was entered from this floor was so constructed and fastened that it could be opened by persons standing in the hallway. Between six and seven o'clock in the afternoon of May 7, 1883, the plaintiff, accompanied by a lady, entered the hallway from the street, walked towards the elevator, and as she approached it the door was thrown open, she passed through and the car being above, she fell to the bottom of the shaft, sustaining external and internal injuries. This action is for the recovery of the

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damages sustained, and it is alleged in the complaint : (1) that the hallway on the ground floor which led to the elevator was not lighted ; (2) that the door through which the car was entered from the hallway was fastened so it could be opened from the hallway ; (3) that defendant employed or permitted a boy to run the elevator who negligently opened the door and thereby invited the plaintiff to pass through when the car was in the upper part of the shaft.

It was conceded at the trial that at the time of the accident there was no artificial light in the hallway ; but whether it was then so dark that a light was required was a disputed fact. It was also conceded that the door through which the car was entered from the hallway could be opened from the hallway, and that upon the occasion in question it was so opened by a boy by the name of Reilly, a younger brother of the person employed by the defendant to run the elevator. Witnesses called by the plaintiff testified that young Reilly had run the elevator on many occasions before the accident ; while the witnesses called by the defendant testified that he had never run it. The defendant insisted that the plaintiff contributed to the accident by failing to observe that the car was not in place ; urging that if she had looked attentively she could have seen that it was absent, or if she had listened that she could have heard it descending from above.

At the close of the plaintiff's case the defendant moved to dismiss the complaint upon the ground that no negligence had been shown that was attributable to the defendant, or to any of his employes ; and when both parties rested the defendant asked the court to direct a verdict in his favor upon the ground above stated, and upon the further grounds, that young Reilly was not defendant's employe ; and that the plaintiff was guilty of contributory negligence in not looking before she walked through the door. Both motions were denied and the defendant excepted. In this there was no error. The defendant assumed to operate the elevator for the benefit of his tenants, and he was required to exercise due care for their safety, and was liable to his tenant for the negligence of his employes in

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operating the elevator. The evidence was sufficient to sustain a finding that young Reilly had run the elevator on so many occasions that the plaintiff was justified in assuming that he was employed by the defendant in that service; and, also, to sustain a finding that this practice of young Reilly was known, or should have been known, to the defendant's son, who had the general supervision of the building, and to the engineer employed in and who superintended the building and the running of the elevators, with power to employ attendants. For their neglect the defendant is liable. And so, also, was the evidence sufficient to justify the jury in inferring that the hallway and elevator should have been lighted. The door to the car of the elevator being thrown open by a boy who had been accustomed to throw it open, it was not, as a matter of law, contributory negligence in the plaintiff to pass through the door without stopping to look and listen. An elevator for the carriage of persons is not, like a railroad crossing at a highway, supposed to be a place of danger, to be approached with great caution; but, on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen or make a special examination.

The court instructed the jury that there was no evidence that young Reilly was employed by the defendant, and then said: "But though he was not such a servant, it may be a question for you whether the defendant should not have exercised such supervision over the building as to make it impossible for that brother to do acts from which the tenants might have derived the impression that he was such a servant." To this the defendant excepted. The court did not go beyond the law in directing the jury to determine, as a question of fact, whether the defendant should not have exercised sufficient supervision over his building to have prevented this young and unauthorized boy from acting as, and creating the impression that he, in fact, was, an attendant at the elevator.

The case shows that the defendant requested the court to charge six propositions, which are set forth, but it does not

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show what answer the court made or how it disposed of them. But two exceptions were taken to the charge, one to the instruction as to the supervision of the building, which has been discussed, and the following: "Defendant's counsel also excepts severally to each and every refusal of the court to charge each and every proposition requested by defendant's counsel." It is urged that the refusal to charge the first and second of the six propositions was error. It is sufficient to say that the case does not show that the court refused to charge any one of the requests. The exception above quoted did not point out wherein defendant's counsel conceived the court to have erred, and thus given an opportunity for correction, for which reason it is unavailing. (*Walsh v. Kelly*, 40 N. Y. 556; *Requa v. City of Rochester*, 45 id. 129; *Harwood v. Keech*, 4 Hun, 389; *S. C.*, 6 T. & C. 665; *Beaver v. Taylor*, 93 U. S. 46.)

No exceptions were taken to the rulings admitting or excluding evidence, and the record disclosing no error, the judgment should be affirmed, with costs.

All concur, except BRADLEY and HAIGHT, JJ., who concur in result.

Judgment affirmed.

THE PEOPLE ex rel. ABEL S. MYERS, Appellant, v. JOHN BARNES et al., as the Board of Town Auditors of the Town of Highlands, Respondents.

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The term "audit," as applied to the action of a board of town auditors, means to hear and examine; it includes both the adjustment or allowance and the disallowance or rejection of an account.

As a general rule no claim against a town is obligatory upon or enforceable against it until it has been audited and allowed by said board. Its jurisdiction over such claims is not only original but its decision is conclusive until reversed or modified by another court in the manner prescribed by law, *i. e.*, in proceedings by *certiorari*.

In proceedings by *mandamus*, instituted by a commissioner of highways, to compel the board of town auditors to audit certain claims against the town for costs awarded against the relator and paid by him in actions

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brought by him as such commissioner, and for moneys expended by him in that capacity, it was admitted that the claims had been presented to former boards and rejected by them on the ground that the town was not legally liable to pay them. *Held*, that the former adjudications were conclusive, and that until reversal they formed a bar to a reauditing of the bills and to the application for a *mandamus* to compel it.

Neither the Revised Statutes (1 R. S. 857, § 8), nor the Code of Civil Procedure (§ 1981), impose an absolute liability upon towns for all judgments recovered against a sole commissioner of highways in actions prosecuted by him in his official name.

The board of town auditors have power to examine and determine whether the action was one the commissioner had the right to prosecute in his official character and whether it was carried on in good or bad faith.

In determining as to the liability of the town the board acts judicially, and its action cannot be reviewed or controlled by the courts through a writ of *mandamus*.

Reported below, 44 Hun, 574.

(Argued March 5, 1889; decided March 19, 1889.)*

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 1, 1887, which overruled the relator's exceptions, affirmed a judgment entered upon an order dismissing the complaint and the application for a writ of *mandamus*.

The nature of the proceeding and the facts are sufficiently stated in the opinion.

T. F. Bush for appellant. The board cannot avoid the performance of its duty of auditing and certifying claims by deciding erroneously that they were not legal town charges. (*People v. Bd. of Supervisors*, 11 Hun, 306; 73 N. Y. 173; Laws of 1840, chap. 305; 1 R. S. [7th ed.] 834, 835, 841; *People ex rel. v. Chapin*, 105 N. Y. 309; *People v. Supervisors of Delaware Co.*, 45 id. 196; *People v. Town Auditors*, 82 id. 80.) If the board decides that an illegal claim is legal and audits it, the audit is without jurisdiction and void, and a *mandamus* will lie to compel a change of decision and a cancellation of the audit. (*People v. Lawrence*, 6 Hill, 244; *People v. Bd. of Suprs.* 11 Hun, 306; 73 N. Y.

* This case was not reported in its order, as a motion for reargument was pending.

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173.) All the claims presented by the relator are legal town charges. (1 R. S. [7th ed.] 841, §§ 2, 8; Code of Civil Pro. §§ 1926, 1931; 2 R. S. [7th ed.] chap. 16, part 1, title 1, §§ 16, 48, 53; *People v. City of Kingston*, 101 N. Y. 96; *People v. Supervisors*, 45 id. 196; *People v. Town Auditors*, 82 id. 80; *Gould v. Glass*, 19 Barb. 179, 189.) The unqualified power of the highway commissioners to sue for penalties carries with it the right to employ all the remedies provided by law, and to incur such expense as may be necessary to reach a final determination of the controversy. (*People v. Town Auditors*, 74 N. Y. 310; 75 id. 316; *People v. Supervisors of Ulster*, 93 id. 397.) The settlement with the relator and certificate made and entered by the board of the amount due him, \$128.17, March 4, 1882, was a judicial act, and put the existence and amount of the claim beyond question. (1 R. S. [7th ed.] 834, 835, §§ 46, 47, 48; Laws of 1863, chap. 172; *Osterhoudt v. Rigney*, 98 N. Y. 222; *People v. Supervisors*, 45 id. 200; *Supervisors v. Briggs*, 2 Denio, 26; Laws of 1858, chap. 103; Laws of 1865, chap. 442; 2 R. S. [7th ed.] 1218.) It is not necessary that the consent of the board shall precede the expenditure, the statute does not in terms require it. It is the consent of the town officers, and not the order in which it is given, that constitutes the essential requirement of the statute. (*People v. Supervisors*, 93 N. Y. 401, 402; *G. S. Co. v. Whitten*, 7 Hun, 44; 69 N. Y. 337.) The board had jurisdiction through the special power conferred by this statute, and any informality or irregularity can only be corrected by a direct proceeding for review. (*Osterhoudt v. Rigney*, 98 N. Y. 237.) The commissioner acted within the line of his authority, and the order changing the districts was regular. (2 R. S. [7th ed.] 1213, § 5.) The exercise of discretion by the court below is reviewable here. (*People ex rel. v. Common Council*, 78 N. Y. 56-61; *People ex rel. v. Chapin*, 104 id. 96.) The decisions of the lower courts are based entirely on questions of law, as none of the material facts are disputed. (*Pharis v. Gere*, 107 N. Y. 231.) As to this claim, by the act of 1858, as amended (2 R. S.

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[7th ed.] 1218), the board was vested with an absolute power to determine as to the necessity and propriety of the expenditure made and to consent or withhold consent to the same. (Laws of 1840, chap. 305, §§ 3, 4; 1 R. S. [7th ed.] 835; *Hull v. Suprs.*, 19 Johns. 259; *People ex rel. v. Suprs.*, 45 N. Y. 196; *People ex rel. v. Clerk of Marine Court*, 3 Abb. 491; *Judges of Oneida Co. v. People*, 1 Johns. 179.) When an account is presented for services which are legally chargeable to the county, it is the duty of the board to audit and allow it. How much shall be allowed rests in its discretion in subservience to established rules. But it must take action and allow the claim, when legal, at some amount. And if it does not, where there is no remedy by action, it can be compelled by *mandamus* to proceed so to do. (*People ex rel. Johnson v. Bd. Suprs.*, 45 N. Y. 196, 200, 206; *Hull v. Suprs.*, 19 Johns. 259; *People v. Clerk of Marine Court*, 3 Abb. Ct. App. Dec. 501; *People v. Suprs.*, 32 N. Y. 473; 51 id. 401; 5 Wend. 114; 58 Barb. 139; Laws of 1840, chap. 305; 1 R. S. [7th ed.] 835, 841, 842; 2 id. 926, 978, 979; *People ex rel. v. Bd. Town Auditors*, 82 N. Y. 180; *Osterhoudt v. Rigney*, 98 id. 222; *People v. Suprs.*, 93 id. 403.) If such a board, through an erroneous decision of the law, audits an illegal claim, their judgment is not final like the judgment of a court, but will be corrected by *mandamus*. (*People v. Bd. of Suprs.*, 73 N. Y. 173; *Bd. of Suprs. v. Ellis*, 59 id. 620.)

Lewis E. Carr for respondents. The writ was properly dismissed by the trial justice because the evidence given on the trial of the issues raised failed to establish such a clear, legal right in the relator to a *mandamus* as justifies a resort to that remedy. (*People ex rel. Stevens v. Hayt*, 66 N. Y. 606; *In re Gardner*, 68 id. 467; *People ex rel. Lunney v. Campbell*, 72 id. 496; *People ex rel. Krohn v. Miller*, 39 Hun, 557, 565; *People ex rel. Gas Light Co. v. Common Council*, 78 N. Y. 56, 61; *People v. Thomson*, 25 Barb. 73; *People ex rel. Demarest v. Fairchild*, 67 N. Y. 334; *People ex rel. Francis v. Common Council*, 78 id. 34; *People ex rel. Mil-*

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lard v. Chapin, 104 id. 96, 100.) When claims have once been passed upon by a board of town auditors and rejected upon their merits, no power exists in a subsequent board to review that decision or reopen the matter once decided. The decision once made is as final as the judgment of a court. (*Osterhout v. Pigney*, 98 N. Y. 222, 234; *People v. Suprs. of Schenectady*, 35 Barb. 408, 414; *People ex rel. v. City of Kingston*, 101 N. Y. 82, 94; *People ex rel. Everett v. Suprs. of Ulster*, 93 id. 397, 404; *People ex rel. Life Ins. Co. v. Chapin*, 103 id. 635; *Howland v. Eldridge*, 43 id. 457.) The judgment in question for costs against the relator, which he paid, was properly rejected by the auditors when it was presented to them in 1883, and certainly in 1885. (1 R. S. [7th ed.] 841, 842, § 2; *People ex rel. v. Town Auditors*, 74 N. Y. 310, 315, 316; *Monk v. Town of New Utrecht*, 104 id. 552, 557; *People ex rel. Bd. of Suprs.*, 93 id. 397, 403, 404; *People ex rel. Wallace v. Abbott*, 107 id. 225-227.) Under the statute invoked by the appellant he was not put to his action until he was secured against the costs of the prosecution. If he moved without that he had no claim against the town until the proper auditing officers had decided that his claim was one that the town ought to pay. (*People ex rel. Bd. of Suprs.*, 93 N. Y. 404.) Commissioners of highways are not town officers. (*People ex rel. Van Keuren v. Town Auditors*, 74 N. Y. 310, 315; *People ex rel. Everett v. Bd. of Suprs.*, 93 id. 397, 404.) Commissioners of highways have no power or authority to run the town in debt. (*Barker v. Loomis*, 6 Hill, 463; *Mather v. Crawford*, 36 Barb. 564; *Bridge Co. v. Barnett*, 1 S. Rep. 600, 603; *People ex rel. Van Keuren v. Town Auditors*, 74 N. Y. 310; *People ex rel. Loomis v. Town Auditors*, 75 id. 316; *People ex rel. Everett v. Bd. of Suprs.*, 93 id. 397, 401.) The judgment rendered constitutes a bar to the claim for the balance of 1882, even if it be held that it at any time had any vitality against the town. (*Dunham v. Brower*, 77 N. Y. 76, 80; *Blair v. Barlett*, 75 id. 150, 153; *Brown v. Mayor, etc.*, 66 id. 385.) The relator was not a town officer and his claims were

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not town charges. (*People ex rel. Van Keuren v. Town Auditors*, 74 N. Y. 310, 315, 316; *People ex rel. Everett v. Bd. of Suprs.*, 93 id. 397, 403, 404.)

POTTER, J. The issue arose upon an answer to an alternative writ of *mandamus* requiring the respondents, as the board of town auditors, to audit three claims in favor of the relator against said town and to certify the same to the board of supervisors of the county.

These claims are for the costs awarded in a judgment against the relator in an action commenced by the relator as commissioner of highways in said town against one Charles Hickok, to recover penalties incurred by him as one of the overseers of highways in said town, amounting to \$76.10, which the relator paid, with interest, on the 3d day of November, 1883, for the necessary costs and disbursements incurred and paid by said relator in the conduct of said action and in two other actions against the said Hickok for the same or a similar purpose, but withdrawn before judgment therein, and amounting to the sum of \$80.15; and for moneys expended in the year 1881, after the annual town meeting in said town, and in excess of the moneys which came into the relator's hands for the repairing of bridges in said town with the alleged consent and approval of the board of town auditors, and amounting to \$128.17.

The return to the writ contained allegations that these claims were unlawful and the town was not legally liable therefor, and that these identical claims had been presented by the relator in the year 1883, and again on the 5th day of November, 1885, and upon both occasions the same had been audited and rejected by the respondents as the board of town auditors.

Upon the trial, after the introduction of evidence of the judgment awarding costs against the relator, and of the character and consideration of the other two bills, the admissions hereinafter referred to were made and the evidence

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was closed; the respondents made a motion for the dismissal of the complaint and a denial of the writ of *mandamus*, and the same was granted over the relator's exception, and the exceptions were ordered to be heard in the first instance at the General Term. The exceptions were heard and overruled and the order of dismissal affirmed.

I propose to consider, first, these admissions and their effect upon this proceeding.

The admissions were as follows: "It is admitted that the bills were presented to the board of town auditors of 1885. That they examined them, and decided that the town was not legally liable to pay for the whole or any part of them, and rejected them." The same admission was made as to the action of the board in the year 1883. "And it is further admitted that the bills presented to said board of town auditors, in November, 1883, were for the same claims as those presented in November, 1885."

Does not this admission constitute an auditing and a rejection of the claims? To audit is to hear, to examine an account, and in its broader sense it includes its adjustment or allowance, disallowance or rejection. (*People ex rel. Brown v. Board Appt.*, 52 N. Y. 227.)

The statute has created a board of town auditors to examine and decide upon claims made and presented against a town. (1 R. S. 358, 359, 328, 461, 479 Laws of 1881, chap. 701, in relation to judgments against towns or highway commissioners.)

Such board is a statutory tribunal or court to hear and to allow or reject any claims presented against the town. The examination of the account is the trial and its allowance or disallowance is the judgment of this tribunal.

As a general rule, no claim against a town is obligatory upon or is enforceable against the town until it has been audited or examined and allowed. Its jurisdiction over claims against the town is not only original, but it is conclusive until brought under review in another court in the manner prescribed by law. (*Osterhoudt v. Rigney*, 98 N. Y. 234.) The board of

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town auditors is to determine whether a claim presented is a town charge and the amount of it or the portion of it which is a town charge.

The claims presented generally involve questions of mixed law and fact. In some instances the board will have nothing to examine as to the amount of the charge, but simply whether the prosecution or defense was conducted upon reasonable grounds and in good faith.

In certain classes of town charges the amount is fixed by statute, by agreement, or by the judgment of a court. Such are claims for salaries fixed by law, or the amount of damages or costs awarded by the judgment of a court. In some cases, where the rate of compensation by the day is fixed by law, the board determines the amount by ascertaining the number of days of service. For instance, a claim presented by highway commissioners that a judgment recovered against them for injuries arising from a defective bridge or highway. In such a case "a board of town officers * * * shall have power to audit and pay, if they shall deem it just so to do." (Laws of 1881, chap. 700, 704.)

This board must determine the legality of the claim and whether it is a town charge. Oftentimes the legality and not the amount of the claim is the main, if not the only, question for examination. (*Tenney v. Mautner*, 24 Hun, 340; *People ex rel. v. Bd. of Suprs.*, 93 N. Y. 403.)

I think that it may be stated as a general, if not universal, proposition that no claim can be collected of or enforced against a town until it has been audited and allowed by the board of town auditors. (93 N. Y. 403, *supra*; *People ex rel. Van Keuren v. Bd. Town Auditors*, 74 id. 310.)

Statutes have been passed and amended from time to time as to the manner of issuing execution against town and other officers and as to what property may be levied thereunder, but such statutes do not affect the question whether the claim is a town charge. Such is the character of section 1931 Code of Civil Procedure.

If the claim embraced in the judgment against the relator

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is not to be submitted to the judgment of the board of town auditors, it would follow that a highway commissioner may commence actions without a cause of action or upon any pretext against any person whomsoever, and when beaten with costs, the town must pay the judgment.

If the judgment constitutes an absolute liability against the town, why go through the mere formality of presenting to the board for audit and allowance at all? Or what necessity or propriety in asking the court's mandate to the board of auditors to audit and allow it?

If the board of town auditors have no discretion to exercise in allowing or rejecting such claim, why not present it at once in the first instance to the board of supervisors to levy and raise the money to pay it. The admission is that all three claims were presented to and examined by the board and were rejected as illegal claims. Their determination, it seems to me, like the determination of all courts, is conclusive until reversed or modified under proceedings by *certiorari*. A *mandamus* will not issue commanding the board to do over again what it has done, but with a different result. This would imply that the Supreme Court might dictate the judgment of the board. (*People ex rel. v. Town Auditors of Elmira*, 82 N. Y. 82; *People ex rel. Phoenix v. Suprs.*, 1 Hill, 362; *People v. Suprs.*, 93 N. Y. 404; *People ex rel. v. Fairman*, 12 Abb. N. C. 272; *People ex rel. Brown v. Board of Appt.*, 52 N. Y. 227.)

This court has given construction in *People ex rel. Everett v. Bd. Suprs.* (93 N. Y. 397) to this section (1 R. S. 357, § 8), which has been sometimes thought should be construed to establish an absolute town charge in favor of a town officer. The head note in that case is as follows: "In order to make a judgment against a commissioner of highways a town charge, it must have been recovered upon a liability incurred by him while acting within the scope of his authority, and in such case the claim therefor must be presented, passed upon and audited by the board of town auditors."

Besides section 8 (1 R. S. 357, *supra*), relates to the person in whose favor the judgment against the town officer was

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rendered, and to his (the judgment creditor's) remedy to enforce payment of the same. As to *him*, the judgment is made a town charge, and when levied and collected the moneys shall be paid to him.

The claim on account of the judgment, therefore, is for moneys paid out by the relator as commissioner of highways, and so falls within the very letter of the grant of power to the board of town auditors to audit the accounts of town officers for moneys paid out. (1 R. S. [7th. ed.] 836.)

If these views are correct, then the claims under consideration have been adjudicated by the respondents and there is no occasion for, or propriety in asking for, a *mandamus*, and hence this court is not called upon to examine the legality of the claim, but the relator must pursue the remedy afforded by *certiorari* to review the decision of the board. (*People ex rel. Millard v. Chapin*, 104 N. Y. 96.)

This conclusion leads to an affirmance of the judgment, with costs against the relator, and thus harmonizes with the views of all the members of the court at General Term as to two of the bills, and with two of its members as to the third bill.

There is another defense to this proceeding, if the bills have been audited and rejected by the town board upon their merits, and that is, that such audit forms a bar to a reauditing of the bills by the board of town auditors and to the application for a *mandamus* requiring them to do so. (*Osterhoudt v. Rigney*, 98 N. Y. 222; *People ex rel. Hotchkiss v. Bd. Suprs.*, 65 id. 222; *People ex rel. v. City of Kingston*, 101 id. 82-94.)

This court is not called upon to examine the legality of the claim or to express any opinion in respect to the question whether these bills or any of them are a legal charge upon the town of Highlands.

The judgment should be affirmed.

All concur, except BROWN, J., dissenting, and PARKER, J., not sitting; BRADLEY, J., concurring in result.

Judgment affirmed.

Opinion *per Curiam*.

On motion for reargument the following opinion was handed down:

Per Curiam. The relator was the sole commissioner of highways of the town of Highland from the annual town meeting in March, 1881, to the annual town meeting in March, 1883. On the Tuesday preceding the annual town meeting boards of town auditors are required to audit the accounts of "*all town officers* who receive or disburse any moneys belonging to their respective towns." (2 R. S. [8th ed.] 908.) On the last Thursday preceding the annual meeting of the board of supervisors, boards of town auditors are required to meet and audit "the accounts of *all charges* and claims payable by their respective towns" and certify all claims allowed to the board of supervisors, which body is required to levy the sums certified upon the taxable property of the town. (Chap. 305, Laws of 1840; 2 R. S. [8th ed.] 907.)

On the last Tuesday, preceding the town meeting of 1882, the board of auditors met, examined the accounts of the relator as commissioner and certified in due form that \$128.17 was due him from the town. Why this claim was not certified to the board of supervisors by the board of town auditors when they met on the last Thursday preceding the annual meeting of the board of supervisors in 1882, does not appear.

When the annual town meeting for 1882 was held there were thirty-three road districts in the town. A commissioner of highways is required (Chap. 503, Laws of 1880; 2 R. S. [8th ed.] 1354), within one week after the annual town meeting to appoint as many overseers of highways as there are road districts in the town, which duty the relator duly performed March 24, 1882. Charles Hickok was appointed overseer of district No. 3. On the same day the relator duly assessed the highway labor, made out and certified the lists or warrants for the several road districts, which were delivered to the several overseers as prescribed by the statute. (2 R. S. [8th ed.] 1358, §§ 24, 25.) May 1, 1882, the overseers of districts Nos. 12, 18 and 27 resigned, and their resignations were accepted by the relator. May 3, 1882, he made an order

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by which he assumed to abolish districts Nos. 12, 18 and 27 and added the territory embraced within them to district No. 3. The assessment lists or road warrants which had been issued to the overseers of districts Nos. 12, 18 and 27 were returned to the relator, who delivered them to Hickok, the overseer of No. 3, and directed him to execute them. Subsequently, Hickok refused to obey the commands of the relator and enforce the assessments against persons and property in districts Nos. 12, 18 and 27, alleging as his justification that the attempted abolition of those districts and the addition of the territory within them to his district was in violation of the statute authorizing a sole commissioner of highways to divide his town into as many road districts as he shall think convenient by a written order made at least ten days before the annual town meeting. (Sub. 5, § 1; 1 R. S. 501; 2 id. [8th ed.] 1347.) June 28, 1882, the relator began an action against Hickok in a Justice's Court in the town of Highland, alleging as a cause of action that Hickok, by refusing to obey the commands of the relator and enforce the assessments, had incurred the penalties imposed by statute upon overseers who unlawfully refuse to perform their duties. (1 R. S. 504, § 16; 2 id. [8th ed.] 1350.) The action was twice tried, resulting in disagreements of the juries, and was discontinued. A second action was begun in a Justice's Court of the town of Bethel, which was tried and resulted, in August, 1882, in a judgment for the defendant of no cause of action, with costs. The relator appealed to the County Court, demanding a retrial, which was had, resulting, April 28, 1883, in a judgment of no cause of action, with \$76.10 costs, which the relator paid November 3, 1883. Assuming that the litigation was proper, the relator necessarily expended \$80.15 in conducting it.

On the last Tuesday (February twenty-seventh), preceding the annual town meeting of 1883, the relator presented his accounts for moneys received and disbursed as commissioner for the preceding year to the board of town auditors (but the claims now sought to be recovered were not included therein), and thereupon his account was audited and it was found that

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he had received \$134.37 more than he had paid out; which sum was adjudged to be due from him to the town. In July, 1883, the supervisor of the town brought an action in a Justice's Court against the relator and his sureties upon his official bond for the recovery of this sum which action the relator settled July 30, 1883, by paying the amount claimed.

On the last Thursday (November 8, 1883), preceding the annual meeting of the board of supervisors in 1883, the relator presented to the board of town auditors his claim audited in 1882 for \$128.17; his claim for the judgment paid November 3, 1883, \$76.10; amount expended in the litigation against Hickok, \$80.15, and demanded that the accounts, with interest, should be allowed him and certified to the board of supervisors, but the claims were all rejected. The relator re-presented the claims to the town board on the last Thursday preceding the annual meeting of the board of supervisors in 1885 and they were again rejected. Thereupon, November 30, 1885, the relator obtained an alternative writ of *mandamus* requiring the board of auditors to certify to the board of supervisors the audit of 1882 (\$128.17) and the judgment for \$76.10 costs, and to audit the claim for \$80.15, or show cause, etc. An issue of fact was joined which was tried at circuit, and at the close of the evidence the writ was dismissed and the exceptions taken were ordered heard at General Term in the first instance. Upon a case made the General Term sustained the ruling at circuit and ordered a judgment for the defendant, with costs, which was entered, and from which the relator appealed.

The appeal must be determined upon the assumption that every disputed question of fact would have been found in favor of the relator.

The \$128.27 was expended by the relator without first obtaining the consent of the board of town auditors in the reparation of bridges damaged after the annual town meeting of 1881. The defendants assert that such expenditure being in violation of the statute (Chap. 103, Laws of 1858; 2 R. S.

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[8th ed.] 1353), the relator is not entitled to recover the sum of the town. The relator, however, insists that the auditing of the bill by the board was a legal ratification of his act and made his claim upon the town as valid as though the expenditure had been first duly authorized, as provided by the statute cited, and afterwards duly audited. If the relator's position be correct, the fact remains that the board had the power to examine this claim for these unauthorized expenditures and determine whether they were, in fact, made, and if so, were they necessary or reasonable; and it had the right, acting in good faith and within legal rules, to reject the whole or part of the claim for such reason. The relator also insists that the bill having been once audited, the board had no right to reaudit and reject it. The answer to this is that the relator by presenting this claim to the board at its subsequent meetings for audit, submitted his rights to it, and he cannot now successfully assert that the board was without power to re-examine and allow or disallow a claim which he submitted for its determination.

Section 8 of title 5 of chapter 2 of part 1 of the Revised Statutes (1 R. S. 357; 2 id. [8th ed.] 913) and section 1931 of the Code of Civil Procedure do not impose an absolute liability upon towns for all judgments recovered against a sole commissioner of highways in an action prosecuted in his official name. (*People v. Bd. of Suprs. of Ulster*, 29 Hun, 185; 93 N. Y. 397.) The board of town auditors had the power to examine and determine whether the action was one which the relator had the right to prosecute in his official character and whether it was carried on in good or bad faith. The board of town auditors had the power, and it was its duty, to examine and allow or disallow, in whole or in part, the claim for \$80.15 expended in the litigation, out of which the judgment for costs arose.

In determining whether the town was liable for these claims the board acted judicially, and such action cannot be reviewed or controlled by courts through the writ of *mandamus*, which is an appropriate remedy to compel public officers, judicial as

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well as ministerial, to act; and when the act is ministerial the officer may be compelled to perform the act according to law; but officers vested with judicial power which is to be exercised upon a disputed state of facts, or upon facts from which different inferences may be drawn, cannot be compelled by mandamus to decide in a particular way. If the record before us showed that the claims sought to be recovered were made by a statute or by some well-settled rule of law, legal charges against the town, charges which the board was bound to allow in whole or in part, then this case would have been within the rule laid down in *People v. Supervisors of Delaware* (45 N. Y. 196); *People v. Board of Town Auditors of Elmira* (82 id. 80) and kindred cases. But, as we have attempted to show, the relator has failed to establish by the evidence contained in the record the absolute liability of the town for the whole or part of any one of the claims, nor does the evidence present a question of fact which could have been determined so as to establish the liability of the town.

The motion for a reargument should be denied.

All concur, except BROWN, J., not voting, and PARKER, J., not sitting.

Motion denied

LUTHER E. MANSFIELD, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

In an action to recover unliquidated damages for breach of contract, unless the means are accessible to the party sought to be charged of ascertaining, by computation or otherwise, the amount to which plaintiff is entitled, he may not be allowed interest on the amount of damages found, and the submission of the question as to such allowance to the jury is error.

The question whether interest is recoverable in actions on contract does not rest in the discretion of a jury, but is one of law for the court.

G. & M. contracted to construct for defendant the superstructure of an elevator, they to commence work within five days after notice from defendant's engineer that the foundations were ready, and to complete the structure within five months thereafter. Defendant agreed to pay, in addition to the contract-price, \$500 for each day less than the time

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allowed occupied in the work; said engineer served the required notice, but at the time the foundations were not ready. In an action upon the contract plaintiff claimed, and the jury found, that had the foundations been completed and he not delayed by their unfinished condition, he would have completed the work thirty days before the end of the five months, for which he was allowed \$500 per day; he also claimed, and was allowed, damages for the inconvenience and extra work caused by the unfinished condition of the foundations. The court submitted to the jury the question and they allowed interest on the damages found. *Held* (POTTER, J., dissenting), error; that plaintiff was not entitled to interest on either item of damages.

But *held*, that the provision as to the *per diem* allowance was a valid agreement based upon a good consideration; and as the contractors, without fault on their part, were denied the right to perform, they were entitled to the benefits which would have resulted from performance, and so were entitled to the allowance for the thirty days.

Parrott v. K. Ice Co. (46 N. Y. 861); *Mairs v. M. etc., Assn.* (89 id. 498); *Walrath v. Redfield* (18 id. 457); *Duryee v. Mayor, etc.* (96 id. 477); *Van Rensselaer v. Jewett* (2 id. 135); *Dana v. Fiedler* (12 id. 40); *McMahon v. N. Y. & E. R. R. Co.* (20 id. 463); *McCollum v. Seward* (62 id. 316); *Mercer v. Vose* (67 id. 58); *Newell v. Wheeler* (36 id. 244); *Mygatt v. Wilcox* (45 id. 306) distinguished.

Reported on a former appeal, 102 N. Y. 205.

(Argued March 20, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 13, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for alleged breach of a contract made between the firm of Gill & Mansfield, contractors, and the defendant, for the construction by the former for the latter of a grain elevator.

Gill assigned his interest in the contract to Mansfield, the plaintiff.

The clauses of the contract, so far as material, are as follows:

"The said parties of the first part hereby further agree to commence the erection of the elevator within five days after notice from the engineer that the foundations are ready, and to complete the same, ready for use, of all the lofting elevators, within five months thereafter.

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"In consideration of the faithful performance of all the covenants and agreements herein contained by the parties of the first part to this agreement, the said party of the second part hereby agrees to pay to the said parties of the first part the above-named sum of (\$331,500) three hundred and thirty-one thousand five hundred dollars, and in addition thereto the sum of five hundred dollars for each and every day that the elevator shall be completed, as aforesaid, in advance of the expiration of the five months from the time of commencement, as hereinbefore fixed and agreed upon."

On June 22, 1876, defendant's engineer served upon the contractors a notice as follows: "I hereby notify you that the foundations are ready for you to commence the erection of the superstructure, and that the five months allowed for the completion of said elevator will begin on the 27th inst., being five days from the date of this notice." Plaintiff claimed and gave evidence tending to show that at the date of this notice the foundations were not nearly completed; that upon its receipt they sent to defendant a written communication stating this fact, and protesting against being required to go on with the contract at that time and until the foundations were completed; that under an arrangement with said engineer, and at his request that they should begin the work, and his promise that no advantage should be taken of them, they did commence the work; that the foundations were not actually completed until August 24, 1876; that the work was completed, to the use of the lofting elevators, December 24, 1876, and that if the foundations had been ready at the time of the service of the notice, the contract could have been completed in less than four months. Plaintiff claimed as damages the \$500 allowance for thirty days, also damages for the inconvenience and extra work and expenses caused by the unfinished condition of the foundations.

The court directed the jury, if they found for the plaintiff, to render a general verdict, and also to answer the following questions:

"How much is the plaintiff entitled to recover on account

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of being prevented from finishing the work in less than five months? How much is the plaintiff entitled to recover for extra expense in handling material, and how much, if anything, should be awarded the plaintiff for interest?"

To the submission of the question as to interest defendant's counsel duly excepted.

The jury found a general verdict in favor of plaintiff in the sum of \$23,900.57, and to the questions submitted by the court, answered :

"I.—30 days, @ \$500 per day, \$15,000.

"II.—\$802.

"III.—\$8,098₁₀₀."

John E. Burrill for appellant. There was no consideration existing at the time for the defendant's promise to pay the \$500 per day; it was like an offer or an option, and was conditional on performance, in which case it is well settled that no recovery can be had except in case of actual performance. (*Miller v. McKenzie*, 95 N. Y. 575; *Todd v. Weber*, Id. 192; *Sands v. Crooke*, 46 id. 564, 570; *White v. Baxter*, 71 id. 254.) Defendant had the right to revoke its promise, even though the plaintiff had made preparations for its performance, or had incurred some liability or expense with a view to undertaking the performance of it in reliance on the promise; but in the latter case the plaintiff would be entitled to recover from the defendant compensation for what he had so done, or for the expenditure or liability which he had so incurred. (*U. S. v. Behan*, 110 U. S. 338.) Under no circumstances and on no principle could the plaintiff in such case recover the sum which had been agreed to be paid only on the performance of the condition. (*Dubois v. D. & H. C. Co.*, 4 Wend. 285.) Plaintiff was not entitled to recover the \$500 per day on the principle of "gains prevented." (*United States v. Speed*, 8 Wall. 77; *McMaster v. State*, 108 N. Y. 557; *U. S. v. Behan*, 110 U. S. 338, 344; *Griffin v. Colver*, 16 N. Y. 489, 495; *Passinger v. Thorburn*, 34 id. 634; *White v. Miller*, 71 id. 118, 133; *Masterton v. Mayor, etc.*, 7 Hill, 61;

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Messmore v. N. Y. S. & L. Co., 40 id. 422.) In case of unliquidated claims interest is not allowable, even from the commencement of the action. (*McMaster v. State*, 108 N. Y. 557; *White v. Miller*, 71 id. 118; 78 id. 393.)

W. W. Mac Farland for respondent. Defendant was bound under the contract to have the foundations ready at the time of requiring plaintiff's firm to commence the work so that it could be proceeded with to the utmost advantage and economy. (*Mansfield v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 205.) Gains prevented as well as losses sustained may be recovered as damages for a breach of contract where they can be rendered reasonably certain by evidence, and have naturally resulted from the breach. (*White v. Miller*, 71 N. Y. 118, 133; 78 id. 393; *Passinger v. Thorburn*, 34 id. 634; *Milburn v. Belloni*, 39 id. 53; *Masterlon v. Mayor, etc.*, 7 Hill, 63; *Griffin v. Colver*, 16 N. Y. 489; *Messmore v. N. Y. S. & L. Co.*, 40 id. 422.) If by any act or omission of duty on the part of the defendant the contractors were hindered in the prosecution of the work and subjected to increased expense, the plaintiff was entitled to recover as damages such additional amount as was required to be expended to complete the contract. (*Allamon v. Mayor, etc.*, 43 Barb. 33; *Starbird v. Barrons*, 38 N. Y. 230, 239; *Cross v. Beard*, 26 id. 85, 88; *Mansfield v. N. Y. C. & H. R. R. Co.*, 102 id. 205, 211.) The sole fact that a demand has not been liquidated is not a bar to the absolute legal right to interest. (*White v. Miller*, 78 N. Y. 303-305, 393; 71 id. 118; *Sedg. on Damages* [5th ed.] 432-440; *Parrott v. K. & N. Y. Ice Co.*, 46 N. Y. 361-369; *Van Rensselaer v. Jewett*, 2 id. 135; *Dana v. Fiedler*, 12 id. 40; *McMahon v. N. Y. & E. R. Co.*, 20 id. 463; *Mairs v. M. R. E. Assn.*, 89 id. 498-507; *Walrath v. Redfield*, 18 id. 457; *Duryee v. Mayor, etc.*, 96 id. 477-499; *McCullom v. Seward*, 62 id. 315; *Mercer v. Vose*, 67 id. 56; *McMaster v. State*, 108 id. 542.) In all cases where interest is not a matter of express stipulation in contracts, it is adopted by the law as a just and convenient instrumentality and aid in enforcing the

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rule of just compensation, whether the case arises *ex delicto* or *ex contractu*. (*White v. Miller*, 71 N. Y. 118; 78 id. 393; *McMaster v. State*, 108 id. 542; 43 id. 372; 89 id. 507.)

BRADLEY, J. I think the defendant's exception was well taken to the submission to the jury of the question of interest upon the amount of damages they should find against the defendant. The action was to recover for breach of contract. In such cases whether interest is recoverable does not rest in the discretion of the jury, but it is a question of law for the court, while in actions sounding in tort when the recovery of interest is permissible it is, with some exceptions, a question for the jury. (*Duryee v. Mayor, etc.*, 96 N. Y. 478.) The rule upon the subject may appear to have been involved in some uncertainty, but now it seems to be reasonably well defined in this state. In *McMaster v. State* (108 N. Y. 542), the claim was for damages founded upon a breach of contract for the supply of materials for and services in the construction of a public building. The damages resulted from the refusal of the state to permit the contractor to proceed with the work to its completion, as provided by the contract. And such damages consisted of a loss of profits, which would have been realized by performance of the work at the contract-price. The court held that interest was not allowable even from the time of the commencement of the action or proceeding, because the claim was unliquidated, and "there was no possible way for the state to adjust the same and ascertain the amount which it was liable to pay." And reference was made to *White v. Miller* (71 N. Y. 118; 78 id. 393). That was an action to recover damages resulting from breach of warranty upon sale of a quantity of cabbage seed. The referee on the first trial allowed interest upon the damages from the time the crop would have been harvested. The court held that was error, for the reason that "the demand was unliquidated and that the amount could not be determined by computation simply, or reference to market values." (71 N. Y. 134.) On the next trial the plaintiffs were allowed to recover interest

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upon the amount of damages from the time of the commencement of the action. This was held to be error. And after reviewing many prior cases on the subject the court, by EARL, J., remarked, that some of those cited "tend to show that where an account for services or for goods sold and delivered, which has become due and payable in money, although not strictly liquidated, is presented to the debtor and payment demanded, the debtor is put in default and interest is set running ; and that, if not demanded before, the commencement of the suit is a sufficient demand to set the interest running from that date. But there is no authority for holding in a case like this, where the claim sounds purely in damages, is unliquidated and contested, and the amount so uncertain that a demand cannot set the interest running, that it can be set running by the commencement of the action. * * * The claim is no less unliquidated, contested and uncertain. The debtor is no more able to ascertain how much he is to pay. * * * The conditions are not changed, except that the disputed claim has been put in suit, and there is no more reason or equity in allowing interest from that time than from an earlier date." (78 N. Y. 399.) The judicial reason thus stated for the rule applied in that case, is applicable to the present case, and is no less applicable to the damages awarded by way of *per diem* allowance for the time the jury found the plaintiff and his associate would have completed the work in advance of five months if the foundation had been completed on June 22, 1876, than the other class of damages allowed to the plaintiff. The alleged breach of contract was, that when the stipulated notice was given the foundation was not ready for the superstructure, which the plaintiffs agreed to erect upon it. And while they were not required, they were permitted to proceed and charge the defendant with such damages. (*Mansfield v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 205.) Whether they could and would have completed the work in less than five months if the foundation had been entirely ready when the notice was given, and if

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so, how many days in advance of that time, were questions of very much uncertainty as appears by the evidence, and so much so that there can be assumed to have existed no basis upon which the defendant could have made any estimate with a view to any adjustment of the amount as between it and the plaintiff. The alleged claim was unliquidated, and as uncertain in amount as any can well be conceived to be. It was necessarily in some sense speculative, as it involved the consideration of causes the presence or absence of which could not be demonstrated, bearing upon the ability or inability of the contractor to do the work within any certain time if they had been permitted to proceed with the utmost economy and advantage within five days after defendant's notice was given. This branch of the claim for damages was not for services, but was sought to be obtained and was recovered as prospective profits, of which the plaintiff was deprived by the breach of the contract. And it was no less unliquidated for the purpose of the question now under consideration, than it would have been if there had been no stipulated *per diem* allowance provided by the contract for the diligence of the contractors in doing the work. The amount of such claim for damages was entirely uncertain, and was closely contested by the defendant. So much so that a verdict for the defendant upon that branch of the case would have been supported by the evidence. This question of interest seems clearly to come within the doctrine of the case before cited, and should have been excluded from consideration on the trial. And, in view of the reason for the rule and the rule itself, so announced, the cases cited by the plaintiff's counsel do not support his proposition in this respect. In *Parrott v. Knickerbocker, etc., Ice Company* (46 N. Y. 361); *Mairs v. Manhattan, etc., Association* (89 id. 498); *Walrath v. Redfield* (18 id. 457); *Duryee v. Mayor, etc.*, (96 id. 477), the actions were in tort, and the question of interest was for the jury. In *Van Rensselaer v. Jewett* (2 N. Y. 135) the action was for rent payable in specific articles with no sum mentioned. *Dana v. Fiedler* (12 N. Y. 40), was brought to recover damages for non-delivery of a quantity of madder pursuant to contract.

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In both those cases the market-values of the property, at the time stipulated for delivery, the defendants had the means of ascertaining, and, therefore, when in default and required to perform they were able to ascertain by computation the amount to which the plaintiffs were entitled. The court held that they were entitled to recover interest.

In *McMahon v. New York and Erie Railroad Company* (20 N. Y. 463), the action was to recover for work performed and materials furnished by the plaintiff in construction of the defendant's road. The defendant had refused to have measurements made by its engineer, which was a condition precedent to payment. The court referred to the doctrine of *Van Rensselaer v. Jewett*, and by SELDEN, J., said that the court there went as far as was reasonable to go, and held that interest was allowable upon the ground that the defendant was in default for not having taken the requisite steps to ascertain the amount of the debt. In *McCollum v. Seward* (62 N. Y. 316), and *Mercer v. Vose* (67 N. Y. 56), the actions were to recover the amount due for services upon a *quantum meruit*. The claims were unliquidated, and the recovery of interest from the time of the commencement of the action was sustained. The former of the last two cases was decided upon authorities there cited, and was followed by the other. The doctrine of that line of cases is, that in actions for services rendered or goods sold, etc., when the debtor is in default for not paying pursuant to his contract, the creditor is entitled to interest by way of damages. (*Newell v. Wheeler*, 36 N. Y. 244; *Mygatt v. Wilcox*, 45 id. 306.) And that is upon the theory that the amount may be known or ascertained and computed, actually or approximately, by reference to market-values. (*Sipperly v. Stewart*, 50 Barb. 62; *Van Rensselaer v. Jewett*, 2 N. Y. 135, 140; *De Lavallette v. Wendt*, 75 id. 579.) There may be cases, from the nature of which it appears that this cannot be done, to which the rule allowing interest is not applicable. (*Smith v. Velie*, 60 N. Y. 106; *De Witt v. De Witt*, 46 Hun, 258.) And, so far as I have observed, it has not been extended to actions to recover unliquidated damages for breach of contract, unless

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the means are accessible to the party sought to be charged, of ascertaining the amount by computation or otherwise to which the other party is entitled. This case cannot be brought within the rule which renders the recovery of interest permissible.

My conclusion is that the plaintiff was erroneously allowed to recover interest, and that the judgment should be modified accordingly.

POTTER, J. This action was brought to recover damages, on the part of the plaintiff and respondent, against the defendant, the New York Central & Hudson River Railroad Company, appellant, for breach of a contract made and entered into between them in respect to the building of an elevator in the city of New York. There are two separate and independent stipulations in the contract for the breach of each of which plaintiff seeks to recover damages. The instrument provided, among other things, that Gill & Mansfield should furnish materials, perform the work in erecting the superstructure of the elevator over the waters, upon piers in the Hudson river between Sixtieth and Sixty-first streets in the city of New York, and should finish the same within five months from the time of the commencement of the work, and should receive as their compensation therefor the sum of \$331,500, and the further sum of \$500 per day for each day less than that occupied in its construction.

In respect to the time of commencing the work it was provided, "that said parties of the first part hereby further agree to commence the erection of the elevator within five days after notice of the engineer that the foundations are ready, and complete the same ready for use, of all the lofting elevators within five months thereafter." The plaintiff alleges that he performed the work within the time by about thirty days, and was thus entitled to receive under the contract \$500 a day for the thirty days, amounting to \$15,000. The plaintiff also claims to recover of the defendant damages for not having the foundation ready for the erection of the elevator within five days of the time when defendant, through its engineer,

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gave the plaintiff notice that the foundations were ready. The damages he seeks to recover in that regard are for inconvenience and extra work in placing and handling and moving his materials upon and about the premises where the erections were to be made.

The case has been twice tried at Circuit and has been to the General Term three times, and to the Court of Appeals once. On the appeal to the Court of Appeals that court laid down certain principles upon which plaintiff's rights depend under the contract and its several provisions, and is to be found in 102 New York, page 205.

Upon that appeal it was held by this court, in substance, that the two stipulations contained in the agreement for breach of which the action is brought were independent of each other, and that the plaintiff could, upon proper proof, recover the \$500 *per diem* for the time that was unexpired for the completion of the structure; and that, also, upon proper proof he was entitled to recover any damage which he sustained by reason of the extra work and moneys paid out in the doing of the work or that portion of the work which he did before the foundations were in the condition required to be by the contract.

The case, of course, must be disposed of upon this appeal in accordance with the principles laid down in the former appeal, and it is not perceived, upon an examination of the case as now presented, but that the last trial was conducted in accordance with the principles thus laid down by the court on the former appeal. Hence we perceive no error in those respects. The question in regard to the rule of damages, so far as interest was concerned, at least upon the sums which plaintiff might prove and become entitled to under the rulings on the former appeal, were not disposed of by the court on the former appeal, but were left to be raised upon such evidence and findings as should be had upon a subsequent trial. Upon the last trial the plaintiff proved, and the jury found, upon sufficient proof, in our judgment, that the plaintiff was entitled to recover \$500 *per day* for the thirty days between the commencement of the work, within which the work could have been done if the foun-

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dations had been completed, and the five months the defendant was allowed to complete it in. This was within the principle decided by this court that the plaintiff might recover in this action. They also found the damages which the plaintiff had sustained by reason that the foundations were not in the condition required to be by the contract was \$802.

According to my apprehension of the case upon this appeal, the only question for our consideration remaining is, whether or not the plaintiff is entitled to recover interest upon these two sums as found by the jury, or upon either of them, as damages. The general rule, no doubt, is, that interest cannot be allowed upon claims for unliquidated damages, but by legislation in some instances or, in respect to a certain class of actions and by decisions of courts, cases of unliquidated damages, in which interest will not be allowed, are becoming more rare. We think the rule still is, that, where the damages are entirely unliquidated, and where the jury have to take numerous elements of uncertainty and doubt and speculation into account in rendering a verdict, the old rule still applies. But where the elements which enter into and form a part of the considerations which the jury are to determine upon in respect to the amount of damages are simple and reasonably certain, the tendency of the decisions of the court is in the direction of an extension of the rule in various cases of unliquidated damages where formerly the rule of allowing interest would not be permitted. It is done for the purpose of making a party who has sustained damage by reason of the failure of another party to perform *his agreement, some compensation or some indemnity for the loss which he has sustained*. Some cases have left this question doubtful, whether in the cases where a party may be entitled to interest the jury may find that interest as damages in their discretion, or whether the court, as matter of law, may direct, if they find a verdict for a party, to also include in or to add to the amount of damages the interest which has accrued from the time of the commencement of the suit, or from some former time when the cause of action accrued, or a demand of payment was made. Whether

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or not it should have been left to the jury, in their discretion, to allow interest as damages is not a matter of any importance in this case ; that is, if the court would have been authorized, as a matter of law, to direct the jury to include in the damages assessed by them also the interest upon such damages as they found, then the jury having allowed the plaintiff to recover interest from the time of the commencement of the action on both the sums for damage which they found for plaintiff, the same result has been reached.

The question, then, recurs whether or not the plaintiff was entitled to interest as matter of law or have it submitted to the discretion of the jury whether interest should have been allowed upon these two claims for damages as found by the jury. There would not seem to be many elements of uncertainty or speculation in the claim of \$500 a day for thirty days. The only thing the jury had to do in respect to that claim was, under the charge of the court and upon the whole evidence in the case, to determine how many days short of the five months the plaintiff did complete this elevator in ; and, further, how many other days less than five months he might have completed the contract in if the foundations had been ready as agreed.

The amount per day was fixed by the agreement of the parties at \$500. Hence to ascertain the amount the plaintiff was entitled to in this respect, was simply to take the number of days which were and might have been saved from the whole period of five months in the construction of the building, which was thirty (as found by the jury), and multiply that thirty by five hundred, and to cast the interest upon that product from the commencement of the suit until the day of the trial. That certainly was not a difficult thing to do, and there was no element of uncertainty about it except the number of days they should determine, from the evidence, had been saved from the five months. The other claim, which was fixed by the verdict of the jury at \$802, did not contain a great many elements of uncertainty, for every element could be established quite accurately and plainly by the evidence in the

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case. The plaintiff, by himself and his witnesses, were called upon and stated how much less work would have been required, or how much more expense attended the beginning and progress of the work for the first few days on account of the unpreparedness of the foundations. That could be easily arrived at by anyone who was familiar with that kind of work, and as the work was done by the plaintiff's workmen, in the presence of numerous others, who were competent to testify, and as they were the witnesses who gave evidence, and as there was nothing about it but that was visible and capable of easy calculation, it would not seem to have been a case where there were many elements of uncertainty and that were speculative, involved in the ascertainment of that amount; and that amount having been ascertained, the computation of the interest was, of course, within the qualification of every juror.

It seems to me that there are many cases reported in which interest from the commencement of the action has been allowed and approved by the court, where the elements of uncertainty were much more numerous and of much more difficult ascertainment.

The cases referred to and relied upon by appellant's counsel were cases in 108 New York, 557, and in *White v. Miller* (71 N. Y. 118, and the same case cited again at 78 N. Y. 393). In those cases interest was not allowed, for the reason that the demand was unliquidated, and was so dependent upon various uncertain and speculative elements that the court was unwilling to allow it.

The latter case was an action to recover damages for a breach of warranty in the sale of cabbage seeds. They had been sold and represented upon the sale to have been seed of a particular kind, and that they would produce a crop of a certain character. It turned out that the seeds were defective, of a different kind, and did not produce the crop which the party sought to raise. The plaintiff sought, in that action, to recover the difference in the value of the crop as raised from imperfect seed of a different character from the value of a crop, such as would be produced from the seed of another

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kind which he sought to purchase. The court allowed him to recover that difference, but this court, upon appeal, held that there were too many elements of uncertainty, such as the weather, the kind of soil, the rains and drouths, etc., to allow interest in such a case or upon such a recovery. In the other case cited by appellant's counsel, the case of *McMaster v. State of New York* (108 N. Y. 542), was a claim arising from the breach of a contract to construct a number of public buildings for the state in the city of Buffalo, thirteen in number. The contractor was to furnish and dress the stone and deliver them upon the premises, and after he had done so in sufficient quantity for some six or seven of the buildings the contract was broken by the other side. He sought to recover his damage by reason of his being compelled to abandon the contract. The court in that case held that as there entered into the damage, which he got an award for, such uncertain elements, to wit, how much he would have made if he had been allowed to go on and finish the construction, the cost of the stone and dressing of them, the value of the stone which were left upon the ground at the time the state abandoned the contract, and more especially because there was involved in that ascertainment of damages the time which he would save, and the work and labor and responsibility which were saved him from completing the job, that those constituted too uncertain elements in a case of unliquidated damages to warrant the allowance of interest. But, in a numerous class of cases, it seems to me the court has allowed interest, either directing it as a matter of law in a class of cases, or submitted it to the discretion of the jury in other cases in the nature of compensation or indemnity. And such cases are to be found in *McMahon v. New York and Erie Railroad Company* (20 N. Y. 463); *Van Rensselaer v. Jewett* (2 id. 135); *Parrott v. Knickerbocker Ice Company* (46 id. 361). In the latter case the court approved of the action of the judge in leaving the question to the jury whether the allowance of interest was not necessary in order to give the plaintiff proper and just com-

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pensation. The claim on which the interest was allowed in this case was for services, or in the nature of services or extra services, rendered by the plaintiff for the defendant, and the courts have gone by recent decisions, and should go beyond the earlier decisions, for the purpose of indemnifying the party who has kept his contract against loss occasioned the party breaking it.

We have carefully studied the very able brief of appellant's counsel, and we have been unable to perceive, either in the reception or rejection of testimony, or in the charge to the jury, any violation of well-settled principles in this class of cases or any departure from the principles laid down in this case on the former appeal in the able opinion of Judge RUGER in this court. We have also looked with some degree of care at the exceptions to evidence and to the judge's charge, and we do not perceive any error that should justify another trial of this action.

I think that the allowance of interest from the time of the commencement of the action to the day of the trial was proper, and the judgment should, therefore, be affirmed, with costs.

All concur with POTTER, J., except upon the question of interest, upon which question all concur with BRADLEY, J., except POTTER, J.

Judgment modified by striking out allowance for interest.

Upon a subsequent motion for reargument the following opinion was handed down :

Per Curiam. The first review in this court was of a judgment of the General Term affirming judgment entered upon dismissal of the complaint directed by the court upon the trial. And upon that trial the evidence offered by the plaintiff to prove damages resulting from the alleged breach of the contract was excluded. The court on such review having determined that the contract required that the foundations be so far completed as to enable the contractors to prosecute the work to the utmost advantage and economy before the notice should be given by the defendant's engineer, held that the giving such notice before that time was a breach of the contract; and as the plaintiff and his associate, without waiver of any rights in

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that respect, had proceeded with the work, the plaintiff was entitled to recover such damages as the contractors had sustained by reason of the breach, and reversed the court below. (102 N. Y. 205.) The question as to what were or might be legitimately treated as damages resulting from the breach of the contract was not then necessarily before the court or determined. And because the matter of recovery of damages upon the clause giving the contractors an opportunity to realize a profit for diligence in the work was not expressly considered as an original proposition in the opinion on the last review, this motion is made. That question arose upon the provision of the contract which gave to the contractors the right to \$500 per day for the time they should complete the work in advance of the time stipulated for its performance. The contention that the plaintiff was not entitled to recover anything by way of damages pursuant to that provision of the contract had the support of an able and thorough argument by the appellant's counsel, by which it was argued :

First. That the right to that allowance rested upon a mere condition dependent upon performance within the stipulated time, which could be set in motion only by the notice of the engineer, and must terminate with the expiration of such time from that when the notice was given ; and that such promise of the defendant, when made, was merely an offer without the support of any consideration.

Second. That the *per diem* allowance so provided for, dependent upon such event, did not constitute prospective profits ; and founded upon the breach of the contract did not come within the meaning of gains prevented. We think the agreement to pay this *per diem* amount may be treated as made with a view to increased compensation, in the event there mentioned, for the work which the contractors undertook to perform for the defendant, as represented by the provision that "in consideration of the faithful performance of all the covenants and agreements herein contained by the parties of the first part to this agreement, the said party of the second part hereby agrees to pay to the said parties of the first

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part the above-named sum of three hundred and thirty-one thousand five hundred dollars, and, in addition thereto, the sum of five hundred dollars for each and every day that the elevator shall be completed, as aforesaid, in advance of the expiration of five months from the time of the commencement, as hereinbefore fixed and agreed upon." And when this court, as it did on the first review, held that the service of the notice that the foundation was, when in fact it was not, ready, etc., was a breach of the contract available to the plaintiff for the recovery of the damages sustained by the contractors in consequence of the delay in the work occasioned by it, the way was open to permit the plaintiff to establish, if he could, that they were by the delay thus occasioned deprived of the gains and profits which they otherwise would have realized from the performance of the work in advance of the five months. Although the contractors did not agree to earn any of the additional sum by completion of the work in advance of the stipulated time, or to make any effort to do so, it cannot be said that the agreement of the defendant to pay such amount, at the rate before mentioned, as the contractors should by their diligence become entitled to, was without consideration. It may have induced the contractors to enter into the agreement upon the terms in other respects represented by it, and it may be assumed that such was its effect upon their action in doing so: And, therefore, if they, without their fault, were by the defendant denied the right to perform the contract, they were entitled to recover the value of it, or, in other words, the benefit to them, which would result from its observance and performance. These views lead to the conclusion that the provision referred to, of the contract, was something more than a mere condition, and was a stipulation in it of such value to the contractors at the time it was made as their diligence would enable them to realize from it. In view of its relation to the contract, of which it forms an inseparable part, it differs from the case where there is no mutuality when consideration is wholly dependent upon performance by the promisee. (*Willets v. Sun Mut. Ins. Co.*, 45 N. Y. 45; *Miller v.*

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(*McKenzie*, 95 id. 575; *White v. Baxter*, 71 id. 254.) Here the contractors undertook by the contract to perform the work, and the price may be deemed to have been regulated somewhat by the diligence with which it should be done. And, with that view, the contract also contained a counter-provision to the effect that the amount which the contractors should recover for the work should be reduced at the same rate for delay in its completion beyond the stipulated time of performance. It follows that the damages resulting from delay, arising from breach of the contract by the defendant, embraced the profits which, otherwise, the contractors would have obtained if they had been uninterruptedly permitted to perform it. And this, in view of the finding of the jury, seems to dispose of the question whether the work would have been performed in advance of, and how many days prior to the expiration of, the stipulated time of performance, if there had been no breach on the part of the defendant, and of the question of damages estimated by them upon such findings. The notice was given by the engineer on June twenty-second, and the time provided by the contract for the commencement of the work was within five days after notice should be given by him. The evidence tended to prove that some work was performed by the contractors intermediate that date and the time when the foundation was completed, which was August twenty-fourth. The defendant's counsel requested the court to charge the jury that, in computing the time within which the work would have been completed, they should take into consideration the work done between June twenty-seventh and August twenty-fourth. The court charged that they should take into consideration the evidence on that subject. And thereupon the defendant's counsel requested the court to charge that they should allow for the work done and material prepared by the plaintiff during that time. The court declined to so charge, and exception was taken. This exception might seem to present a question of some difficulty if not obviated by the manner which this branch of the case was submitted to the jury, which was, that they were to

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determine the question whether the foundations were in such condition as to enable the contractors advantageously and economically to prosecute the work at the time the notice was given, and if they found that the foundations were not in the condition required by the contract, then they were to inquire whether, if they had been in such condition, the contractors could and would have completed the work in less than five months. And if they could and would have completed it in less than that time, how many days less than five months. This covered the whole ground involved in the inquiry essential to the question of damages, and the measure of them founded upon the alleged breach, so far as they were dependent upon the time within which the work otherwise would have been performed by the contractors. The estimate of the time which would have been occupied by them in doing it was, necessarily, somewhat speculative and uncertain, but it is difficult to see any other or better way of submitting the question to the jury. It is evident that the proposition which the court refused to submit to the jury would have afforded them no aid in their way to a conclusion. They were directed to take into consideration all this evidence upon the subject of work performed in the interim referred to.

It is deemed unnecessary to further extend the expression of the considerations which led to the result given to the appeal when it was determined.

The motion for reargument should be denied.

All concur.

Motion denied.

CHARLES S. HINE et al., Respondents, v. PETER BOWE,
Appellant.

The firm of E. & H. executed to plaintiff H. an instrument, in form a bill of sale of all of the firm property. H. executed an instrument in return, which stated that, in consideration of the sale, he agreed to cancel an indebtedness of the firm to him, to pay certain specified debts of the firm "and such other sums for wages, merchandise recently purchased and other claims," as the firm might direct, "as entitled to a preference

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not exceeding \$750." Defendant, as sheriff, levied upon and took the property from the possession of plaintiffs by virtue of attachments issued against the firm. In an action to recover possession defendant claimed that the transfer was, in effect, an assignment for the benefit of creditors, and was fraudulent and void upon its face because of the right reserved to the firm to direct what claims should have the preference for the purpose of the payment of the \$750. *Held*, that the contract, as evidenced by the terms of the two instruments, which were to be taken and construed together, did not necessarily import such an assignment, but might be construed as an absolute sale, for which the cancellation of his own debt and the agreement to pay the sums specified was the consideration; that, although the firm was insolvent, H. was at liberty to purchase the property for the purpose of obtaining payment of the debt due him; and if the sale was made absolutely and in good faith, its validity was not affected by the fact that the vendor reserved the right to direct upon what debts of theirs the \$750 surplus of consideration was to be paid; that the nature of the transaction depended upon the intent of the parties thereto, which, upon the evidence, was properly a question of fact for the jury.

The court refused a request of defendant's counsel to charge that if the firm was at the time insolvent, and by the bill of sale intended to make an assignment for the benefit of creditors it was void. *Held*, no error, as the request did not embrace any suggestion that plaintiff H. was in any respect in privity with the firm in such intent; that this was essential, as he could not be prejudiced by an intent on their part to create a trust which the terms of the instruments did not import, unless he was in some way chargeable with participation in their intent.

A trial court is not required to submit a mere abstract proposition to a jury.

Reported below, 46 Hun, 196.

(Argued March 25, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 26, 1887, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

The action was brought to recover for the alleged conversion of personal property.

The plaintiffs claimed title derived from Epstein & Hine by transfer, evidenced by a bill of sale as follows:

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“NEW YORK, June 12, 1882.

“C. S. HINE, BOUGHT OF EPSTEIN & HINE.

“ Stock tobacco and cigars, fixtures ; accounts considered good ; notes considered good ; accounts and notes considered doubtful ; all as per annexed schedule. \$16,204.43”

At the same time C. S. Hine executed an instrument in the following form :

“NEW YORK, June 12, 1882.

“ In consideration of the sale to me by Epstein & Hine of the stock, etc., described in a bill of sale of this date, I agree to cancel their indebtedness to me for borrowed money, amounting, without interest, to \$9,850, to pay the sum of \$3,300, borrowed by them from Mrs. Moseman, for which I became responsible, and also the following sums, which are entitled to preference, \$280.43 to Jacob Henkel ; \$1,424 to L. C. & J. Elson ; \$300 to C. A. Thaxton & Son ; \$300 to Mary J. Hine ; and such other sums for wages, merchandise recently purchased, and other claims, as Epstein & Hine may direct to be paid as entitled to preference, not exceeding \$750.

“CHAS. S. HINE.”

Upon an arrangement agreed upon, Charles S. Hine took the plaintiff Plant in the business with him and they assumed the firm name of C. S. Hine & Co., to which firm the property was transferred by Hine.

The defendant, as sheriff, in behalf of creditors of the firm of Epstein & Hine, levied attachments, issued in actions against them, upon the property and took it into his custody. This constitutes the alleged conversion. The defendant alleged by way of justification those facts, and that the transfer of the property to C. S. Hine was fraudulent as against the creditors of Epstein & Hine.

Michael H. Cardozo for appellant. The attempt to pay individual debts as a part of the consideration for the transfer of the assets of the insolvent partnership before its creditors

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were paid made the entire transaction void. (*Van Vliet v. Slaison*, 45 Barb. 317; *Knowles v. Toone*, 96 N. Y. 534, 536; *Rogers v. Smith*, 47 id. 324.) An appropriation to the individual debt of one partner of any part of the firm property, even with the assent of his copartner, is illegal and void, provided the firm is not left with sufficient to pay its debts. (*Menagh v. Whitwell*, 52 N. Y. 146, 163; *Wilson v. Robertson*, 21 id. 587; *Ransom v. Van Deventer*, 41 Barb. 307; *Schielle v. Healey*, 61 How. 73; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46.) A transfer of property by which the vendor retains a right, after the transfer, to appropriate part of the consideration therefor to such persons and in such amounts as he desires is void as against existing creditors. (2 R. S. 135; 3 id. [Bank's 7th ed.] 2327; *Knapp v. McGowan*, 96 N. Y. 75; *Young v. Heermans*, 66 id. 374; *Curtis v. Leavitt*, 15 id. 9, 122, 132, 148; *Leitch v. Hollister*, 4 id. 211; *Sheldon v. Dodge*, 4 Denio, 217; *Grover v. Wakeman*, 11 Wend. 187, 200; *Hyslop v. Clarke*, 14 Johns. 458; *Kercheis v. Schloss*, 49 How. Pr. 284; *Goodrich v. Downs*, 6 Hill, 438; *Lukens v. Aird*, 6 Wall. 78; *Sims v. Gaines*, 64 Ala. 392; *Hart v. McFarland*, 13 Penn. St. 182.) The bill of sale and agreement of June 12, 1882, were intended by Epstein & Hine as a general assignment, and are void as such in not complying with the general assignment act of 1877, and, in any event, whether they were so intended, was a question of fact for the jury. (*Britton v. Lorens*, 3 Daly, 23, 26; affirmed, 45 N. Y. 51; *Fairchild v. Gwynne*, 16 Abb. Pr. 23, 31; *Wallace v. Wainwright*, 87 Penn. St. 263; *Mussey v. Noyes*, 26 Vt. 462.) No partnership existed between the plaintiffs, and hence there could be no recovery in this action. (*Smith v. Bodine*, 74 N. Y. 30.)

William H. Arnoux for respondents. The transfer of the property by Epstein & Hine to Charles S. Hine was an absolute sale. (*Seymour v. Wilson*, 19 N. Y. 421.) The knowledge that a firm is in failing circumstances will not, *per se*, render it unlawful for a creditor to receive a transfer of goods

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from the failing firm in satisfaction of a demand. (*Walsh v. Kelly*, 42 Barb. 98; *Auburn Exchange Bk. v. Fitch*, 48 id. 344; *Man v. Whitebeck*, 17 id. 388; *Bedell v. Chase*, 37 N. Y. 386; *Grover v. Wakeman*, 11 Wend. 187; *Spaulding v. Strange*, 37 N. Y. 135; *Hale v. Stewart*, 7 Hun, 591; *Hyslop v. Clark*, 14 Johns. 458; *Miller v. Wayland*, 17 id. 102; *Murray v. Riggs*, 15 id. 571; *Austin v. Bell*, 20 id. 441; *Curtis v. Leavitt*, 15 N. Y. 116; *Mackie v. Cairns*, 5 Cow. 547; *Shoemaker v. Hastings*, 61 How. Pr. 79.) A surviving partner has power, as such, to make an assignment of assets of the firm for the benefit of creditors and to give preference in such assignment. (4 Abb. [N. S.] 210; 51 N. Y. 660; *Robinson v. Stewart*, 10 id. 195; *Babcock v. Eckler*, 24 id. 623; *Dudley v. Danforth*, 61 id. 626.) Even if the alleged sale and transfer was made with intent, on the part of Edget, to hinder and delay his creditors, and plaintiffs had previous notice of such intent, it would not have invalidated the purchase without a further finding that plaintiffs participated in such intent. (*Archer v. O'Brien*, 7 Hun, 146.) A creditor has an unquestionable right to prefer one creditor or one set of creditors to another. (*Seymour v. Wilson*, 19 N. Y. 417; *Stoddard v. Butler*, 20 Wend. 507; *Leitch v. Hollister*, 4 Comst. 211; *Dunham v. Dixon*, 21 N. Y. 131; *Smith v. Beattie*, 31 id. 542; *McClelland v. Renssen*, 5 Abb. [N. S.] 252.) The assignment was in the nature of a mortgage. The primary purpose of which was to secure the payment of the debt, and the trust to account for the surplus was purely incidental, is not within the condemnation of the statute, and such a reservation is not unlawful. (*Leitch v. Hollister*, 4 Comst. 211; *Curtis v. Leavitt*, 15 N. Y. 141; *Dunham v. Whitehead*, 21 id. 131; *Bishop v. Halsey*, 3 Abb. Pr. 400.) Even if there was fraud and intended fraud on the part of the vendors as to certain creditors, it would not invalidate the sale. (*Dudley v. Danforth*, 61 N. Y. 626; *Seymour v. Wilson*, 19 id. 421; *Shoemaker v. Hastings*, 61 How. Pr. 79.)

Otto Horwitz for an attaching creditor.

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BRADLEY, J. The question presented at the trial was, whether the sale made to the plaintiff Hine was in fraud of the creditors of Epstein & Hine. The two instruments constituting the bill of sale and stating the manner in which payment should be made may be taken together, and, for all practical purposes, treated as parts of the same contract. (*Stow v. Tiff*, 15 Johns. 458; *Rogers v. Smith*, 47 N. Y. 324; *Knowles v. Toone*, 96 id. 534.) It appears that the bill of sale embraced all the partnership property of the firm making it. It is contended that the transfer appears upon the face of the instruments to have been fraudulent as against the creditors of Epstein & Hine. This contention is founded upon the fact that the right is reserved to them to direct what claims shall have preference for the purpose of the payment of \$750. That would render it void as against such creditors if the transaction, as thus represented, was an assignment in trust for the benefit of the creditors of the parties who made such transfer. (*Sheldon v. Dodge*, 4 Denio, 217.) But the contract, as evidenced by the terms of these two instruments, does not necessarily require the construction that any such trust was created. The question upon this proposition is not one of intent of the parties otherwise than as the interpretation of the language there used may require. They may be construed to import an absolute sale at a stipulated price, to be paid in the manner therein provided. And, in that view, the sum to be applied in satisfaction of the debt due the purchaser, and to be paid to other creditors of the firm, would constitute the consideration of the sale rather than an application of the proceeds of the property to their payment. The \$750 payable for the benefit of the firm, as it should direct, was a part of the measure of consideration, and if it had been payable directly to the firm, the effect would have been no different. (*Dunham v. Whitehead*, 21 N. Y. 131; *Brown v. Guthrie*, 110 id. 435.) It appears that Epstein & Hine owed the plaintiff the debt, which he agreed to cancel. He was at liberty to purchase the property for the purpose of obtaining the payment of the debt due him, not-

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withstanding the firm was insolvent. This the law permits a creditor to do. (*Dudley v. Danforth*, 61 N. Y. 626; *Auburn Exchange Bank v. Fitch*, 48 Barb. 344.) And when the sale is absolutely and in good faith made to him, no reason appears why the debtor may not as well direct payment of the surplus of the consideration by the purchaser upon his debts, or such debts as he may direct, as to take the money and pay it on them himself. (*Royer Wheel Co. v. Fielding*, 101 N. Y. 504.) But appearances do not always represent the intent of parties to transactions relating to the disposition of property when the rights of creditors of the parties making the transfer are involved. An assignment may be intended to create a trust, although it may not necessarily so appear by its terms. And in such case, as to creditors, it will, in its legal effect and consequences, be treated accordingly. (*Britton v. Lorenz*, 45 N. Y. 51; affirming, 3 Daly, 23.) Whether that was the nature of the transaction of transfer between Epstein & Hine and such plaintiff in this instance, was dependent upon the intent of the parties to it, which upon the evidence was properly a question of fact for the jury. With a view to that question, the defendant's counsel requested the court to charge the jury that if the firm was at the time insolvent, and by the bill of sale intended to make an assignment for the benefit of creditors, it was void, etc. The exception to the refusal was not well taken, because the request did not embrace, within its terms, any suggestion that the plaintiff Hine was in any sense in privity with Epstein & Hine in respect to such intent. This was essential, as the nature of the transfer did not rest wholly upon the instrument executed by the firm, but partly, at least, on that made by such plaintiff. And he could not be prejudiced by an intent on their part to create a trust, which the terms of the instrument did not import, unless he was in some manner chargeable with participation in the purpose to do so. Following that was another request to charge the jury that "no particular form is requisite to constitute an assignment for the benefit of creditors, and if the jury find that the instruments in question

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were intended as a general assignment for the benefit of creditors, the jury must believe that they were intended to pass the entire property of an insolvent firm." This was refused and exception taken. When the rights of creditors of the assignor are involved the court will inquire into the intent of the parties to the transaction for the purpose of characterizing the transfer and its effect. But the court was in this instance required to submit to the jury a mere abstract proposition, unconnected with any suggestion giving it application to the case or to any question of fact requiring the consideration of the jury. As a rule, the court is not required to submit a mere abstract proposition to the jury. (*Moody v. Osgood*, 54 N. Y. 488.) The question for them was not whether or not any particular form was essential to such an assignment. The application of the proposition was dependent upon the finding that the instruments were intended as an assignment in trust for the benefit of creditors. The proper instruction to which the defendant would have been entitled, if requested, was substantially that the form of those instruments was not in the way of such construction and effect, if they so found the fact, and in that event they should so treat them and find for the defendant. The further request to charge that if the jury found that the firm did not part with the property absolutely, or if Epstein & Hine, or either of them, was to receive any substantial advantage or employment in consideration of the transfer, the defendant should have a verdict, requires no consideration, because it had been substantially charged by the court, and the repetition of the charge in that respect could not be required. The court had charged the jury that their verdict should be for the defendant if they found that Epstein & C. F. Hine, or either of them, had any interest in the property attempted to be transferred by them, after the execution of the instruments ; and that if the transaction contained any device to cover up property for their benefit or to secure to them, directly or indirectly, any benefit, the transaction was fraudulent and the verdict should be for

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the defendant. This seems to cover the subject of the last-mentioned request.

The defendant's counsel contends, that the conclusion was warranted that one or more of the debts which the purchaser undertook to pay, were the individual debts of one member of the firm, and that such question should have been submitted to the jury, and, as the consequence of their so finding, the transfer of the property would have been void as against the defendant. It is true that the creditors of an insolvent firm had the right to require that the partnership property be directed to the payment of the firm liabilities. (*Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 id. 146.) The evidence does not fairly justify the inference that any portion of the consideration of the purchase, was by the agreement appropriated to the payment of any individual debt of one of the members of the firm of Epstein & Hine. So much of the debt due the plaintiff Hine as was originally that of Charles F. Hine, became the liability of the firm by virtue of the articles of partnership when the firm of Epstein & Hine was formed. And the reference in the plaintiff's agreement to a debt as one to be paid to Messrs. Elsen, was descriptive of a debt for which Epstein alone was primarily liable, as it was produced by a loan furnished to him, but the firm was liable as indorser to the holder of the paper which represented it. And while the firm was not liable to the Elsens, as between it and the holder, the debt may have been treated as that of the firm. And it seems to have been paid by the plaintiff Hine at the bank where the paper so indorsed was discounted. The manner in which the debt was described, did not qualify the relation of the firm as indorser to it. And the provision for its payment may be deemed as made to relieve the firm from its liability, which such relation permitted it to do.

In the view taken, no other question seems to require consideration.

The judgment should be affirmed.

All concur, except POTTER and VANN, JJ., dissenting.

Judgment affirmed.

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**EDWARD C. PERKINS, as General Guardian, etc., Respondent,
v. JOHN STIMMEL et al., Appellants.**

Where a general guardian of an infant brings an action in his own name as such guardian for an injury to his ward's estate, the question as to his "legal capacity" to maintain the action, if not taken by demurrer or answer, is waived. (Code of Civil Pro. § 499.)

An action at law cannot be maintained against the sureties upon the bond of a general guardian until proceedings for an accounting have been had against the guardian and his default established therein.

The fact of the death of the guardian does not take the case out of the rule, as his personal representatives may be required to account (Code of Civil Pro. § 2806, as amended by Chap. 399, Laws of 1884), and before the sureties can be sued the proceedings on the accounting must at least establish the fact that none of the infant's property has come into the hands of the personal representatives.

In the absence of a decree to that effect the presumption is that said representatives have possession of the infant's estate, and until it is otherwise established a devastavit will not be presumed.

Perkins v. Stimmel (42 Hun, 520) reversed.

(Argued March 26, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1886, which overruled defendant's exceptions and directed judgment in favor of plaintiff upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinions.

Edward P. Wilder for appellants. The plaintiff cannot legally maintain this action; it should have been brought in the name of the infant by a guardian *ad litem*. (Code, §§ 468, 469, 470; *Segelken v. Meyer*, 94 N. Y. 479; *Buerman v. Buerman*, 17 Abb. N.C. 391; *Bradley v. Amidon*, 10 Paige, 235; *Hoyt v. Hilton*, 2 Edw. Ch. 202; *Weed v. Cantwell*, 36 Hun, 528, 533; *In re Stratton*, 1 Johns. 509; *Gunning v. Lockman*, 3 Redf. 273; *In re Price*, 67 N. Y. 231; *Annett v. Kerr*, 28 How. Pr. 324; 35 N. Y. 256; *People v. Holmes*, 3 Wend. 167; *Hoagland v. Hudson*, 8 How. Pr. 343; *People*

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v. *Norton*, 9 N. Y. 179; 2 R. S. 151, § 10; Id. 150, § 3; *In re Hawley*, 104 N. Y. 263, 268.) The foregoing objection is fairly in the case and cannot be deemed to have been waived because not taken by demurrer. (*Hoagland v. Hudson*, 8 How. Pr. 343; *Palmer v. Smedley*, 6 Abb. Pr. 205; 28 Barb. 468; *People v. Booth*, 32 N. Y. 397; Bliss Code [2d ed.] 288, § 481; *Bk. of Lowville v. Edwards*, 11 How. Pr. 216; *Johnson v. Kemp*, Id. 186; *Bk. of Havana v. Wickham*, 16 id. 97; 20 N. Y. 355; *Myers v. Machado*, 6 Abb. Pr. 198; *White v. Brown*, 14 How. Pr. 282; *Phænix Bk. v. Donnell*, 40 N. Y. 413; *Bearns v. Gould*, 8 Daly, 384.) Even if the plaintiff could bring the action, he has not shown any breach of the condition of the bond, for the reason that he has not shown any decree or order of the surrogate against his predecessor. (Code, §§ 2607, 2830; 2 R. S. 116, § 19; *Stillwell v. Mills*, 19 Johns. 304; *Salisbury v. Van Hoesen*, 3 Hill, 77; *People v. Barnes*, 12 Wend. 492; *People v. Corliss*, 1 Sandf. 228; *Trust Co. of Onondaga v. Pratt*, 25 Hun, 23; *Hood v. Hood*, 85 N. Y. 561; *Haight v. Brisbin*, 100 id. 219; *Estate of Scofield*, 3 Civil Pro. 323; *Bieder v. Steinhauer*, 15 Abb. N. C. 428; *Brown v. Balde*, 3 Lans. 287.) Nor can the fact that the guardian is dead create any right to proceed against the sureties upon his bond without first obtaining the decree or order of the surrogate. (Code, § 2606; *Salisbury v. Van Hoesen*, 3 Hill, 77; *Hood v. Hood*, 85 N. Y. 573; *In re Fithian*, 11 C. P. R. 211.) No devastavit on the part of the deceased guardian is shown, and there is, therefore, no basis for the judgment rendered against the sureties. (*Bieder v. Steinhauer*, 15 Abb. N. C. 430; *Josuez v. Connor*, 7 Daly, 448, 454, 455.)

George Putnam Smith for respondent. The action was properly brought by the plaintiff as general guardian of Emily L. Middleton. (*Coakley v. Mahas*, 36 Hun, 157; *Thomas v. Bennett*, 56 Barb. 197; *Hauenstein v. Kull*, 59 How. Pr. 24; *Mayo v. Austin*, 2 City Ct. Rep. 113; Code, §§ 2606, 2608; *Nichols v. Hall*, 7 Hun, 580; *Davis v. Carpenter*, 12 How.

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Pr. 287.) It was unnecessary to go through the form of an accounting before the surrogate before commencing this action. (*Maze v. Brown*, 2 Dem. 217; *Scofield v. Adriance*, Id. 486; *Peck v. Sherwood*, 5 Redf. 416; *Baggott v. Brulger*, 2 Duer, 160; *State v. Rooper*, 9 Mo. App. 21; *Davis v. State*, 68 Ind. 104; *Foster v. Maxey*, 6 Yerg. [Tenn.] 224; *Jarret v. State*, 5 G. & J. 27; *Fulgham v. Herstein*, 77 Ala. 496; *Parker v. Toby*, 9 Baxter [Tenn.] 221; *Comm. v. Murdoch*, 8 Watts. 159, 162; *Barnes v. Trafton*, 80 Va. 524, 534; *Case v. Beauregard*, 101 U. S. 690; *Girvin v. Hickman*, 21 Hun, 316.) The statutes which require an accounting by the principal, like the chancery practice for which they are a substitute, admit the possibility of "special circumstances" which will render such accounting unnecessary. (*Brown v. Snell*, 57 N. Y. 298; *Stillwell v. Mills*, 19 Johns. 404; *Salisbury v. Van Hoesen*, 3 Hill, 76.) The orders appointing Wiley as guardian, and plaintiff as his successor, were "lawful orders" of the surrogate and cannot be attacked collaterally. (*Harrison v. Clark*, 87 N. Y. 572; *Kelly v. West*, 80 id. 139; *Bearns v. Gould*, 77 id. 455; *Lewis v. Dutton*, 8 How. Pr. 99; Code, § 2591.) Even if Wiley's appointment was invalid, the fact that by virtue thereof the guardian received property of the ward, which he otherwise could not have obtained, renders the sureties liable. (*Fridge v. State*, 20 Am. Dec. 463; *Alston v. Alston*, 34 Ala. 15; *Gunther v. State*, 31 Md. 28; *Gray v. State*, 78 Ind. 68; *Behrends v. Rodenburg*, 1 City Ct. Rep. 93.) Courts disregard defects in guardians' bonds. (*State v. Martin*, 69 N. C. 175; *Probate Court v. Strong*, 27 Vt. 202; *State v. Britton*, 102 Ind. 214; *State v. Creusbacher*, 68 Mo. 254; *Alexander v. Commonwealth*, 102 Penn. St. 434; *Mundorff v. Wanger*, 44 N. Y. Super. Ct. 495.)

POTTER, J. The action was brought by the general guardian of an infant to recover from the sureties on a bond of a former guardian, now deceased, the amount of her estate which had been, as alleged, wholly converted to his own use by such former guardian.

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The bond on which this action is predicated was given on or about the 10th of April, 1882. The plaintiff, at the time of the giving of such bond by the defendants, was an infant, and was, at the time of the commencement of this action, an infant under the age of twenty-one years, and this action is brought in the name of Edward C. Perkins as the general guardian of one Emily L. Middleton, the ward of the former general guardian.

The complaint, in substance, alleges that one Wiley, who was appointed by the surrogate general guardian of said Emily L. Middleton, gave a bond in the usual form. The condition of such bond was that the said James Wiley should faithfully discharge the trust reposed in him, and obey all lawful directions of said surrogate touching his trust as general guardian of the infant Emily L. Middleton, and in all respects render a just and true account of all moneys and other property received by him, as guardian, whenever he should be required to do so by a court of competent jurisdiction.

The proof shows, and the complaint alleges, that after such appointment of said guardian, and his qualification as such, there came into his hands, as assets or property of the infant, the amount of some \$16,000, consisting of cash, stocks in corporations, United States bonds, etc. The allegation of the complaint is that said Wiley misappropriated and converted to his own use such assets.

Passing by, for the present, the proof and objections and exceptions to the taking of the proof, the first question that arises is upon the capacity of the plaintiff, as general guardian of the estate of Emily L. Middleton, to maintain this action in his own name. It should be stated, in addition to the facts above, that after the appointment and qualification of said Wiley as guardian, and the giving of the bond on which the action is brought by the defendants Stimmel and M'Creery, as his sureties therein, said Wiley, after making two inventories and filing them with the surrogate, died. That there has been no letters of administration taken out by any of his family, but

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letters of administration were taken out by the public administrator of the city of New York.

After the making said inventories and Wiley's death, the present plaintiff was duly appointed the general guardian of the estate of said Emily L. Middleton, in the place of the former guardian, deceased. There are two questions arising in this case and they are distinctly raised — first at the close of the trial, and have been insisted upon through the appeal to the General Term, and are still insisted upon on this appeal. As before indicated, the first of these questions is, the right of Edward C. Perkins, plaintiff in this action, to maintain the same in his own name as general guardian against the sureties of the former guardian. The question has arisen from time to time in the Supreme Court and in other courts of record in this state, and has been variously decided. Some of them holding that this action may be properly maintained in the name of the general guardian, others holding that the action should have been brought in the name of the infant Emily L. Middleton by a guardian *ad litem*, duly appointed.

In *Edgar Thomas, General Guardian, etc., v. John C. Bennett* (56 Barb. 197), it was held that a general guardian appointed by the surrogate can maintain an action in his own name, as such guardian, to recover a debt due to his ward. Judge FOSTER, writing the opinion of the General Term, reviews a great number of cases in the Supreme Court and in the old courts of chancery, and reaches the conclusion stated as above. He seems to have reached that conclusion through analogy to similar cases brought by a committee of an habitual drunkard or lunatic, based upon the principle that such guardian as well as such committee is a trustee of an express trust and has absolute dominion over the personal property of the ward, with power to sell and confer good title upon the purchaser to settle any debts and claims belonging to his ward and to collect the distributive share of the ward in the estate of deceased persons. It was held in the same manner in *Hauenstien v. Kull* (59 How. Pr. 24). That case was followed and the same conclusion reached in

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the case of *Mary Ann Coakley v. Mahar* (36 Hun, 157), Judge FOLLETT writing the opinion of the court, which was concurred in by Judges HARDIN and BOARDMAN. The question was first practically raised in this court in the case of *Segelken v. Meyer* (94 N. Y. 473). In that case the action was brought by an infant by his guardian *ad litem*, and the action was to recover the property belonging to the infant. The infant at the same time had a general guardian and the question presented was whether the action should not have been brought in the name of the general guardian or in the name of the infant by his guardian *ad litem*. The court, in the opinion in that case, reviews numerous cases upon this subject, and especially the case above cited (*Thomas v. Bennett*), and comes to the conclusion that an action to recover money or personal property belonging to an infant is properly brought in his own name by his guardian *ad litem*. The General Term, in the opinion given in this case, after discussing it at some length, use this language: "That probably it would have been better practice to have brought the action in the name of the infant by her guardian *ad litem*, but there are authorities which allow the suit in its present form;" "the question has no substantial merits;" "the cause of action is precisely the same in either case and the obligation and results are the same if a recovery be had;" "the guardian, in fact, recovers as such in either action and takes the property as guardian, and is bound to account to the infant for the judgment and its proceeds."

In reviewing these various cases upon this question I have been impressed with what I think is a plain theory of the Code, and of the practice upon this subject, viz., that all actions brought by an infant should be brought in the name of the infant, by a guardian *ad litem*. Such has been the character of the changes which have been made in respect to actions brought by infants, and that is indicated by the changes in relation to real estate, which formerly were brought by a guardian *in socage*, and which is now required to be brought in the name of the infant by a guardian *ad litem*, in accordance

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with recent amendments to section 1686 of the Code, having relation to actions in respect to the realty of infants.

If this was the only question in the case, and I had not come to the conclusion that there must be a new trial or the judgment must be reversed on another ground, I should be disposed to hold that this action was properly brought in the name of the general guardian, in accordance with various decisions which have been made from time to time on that subject. But having reached the conclusion that this judgment must be reversed, and inasmuch as it is the plain theory of the Code, and the practice now, that all actions brought by infants should be brought in their name by a guardian *ad litem*, I am inclined to hold that the action should have been brought in the name of the infant by her guardian *ad litem*, and such is and will be the better practice, I think. But while I have reached that conclusion, as a general rule of practice, it cannot avail the defendant in this case, as the objection was not raised by demurrer or answer as shown by the opinion of my brother BROWN in this case.

I have not, in the consideration of this question, overlooked a section of the Code which is cited upon the brief of counsel, and that is section 2608, but that section is especially designed for the remedy to be pursued in case where letters granted by a surrogate appointing one person general guardian have been revoked and a subsequent guardian appointed in his place. I dont think a fair construction of that section interferes with the general proposition that an action should be brought in the name of the infant by a guardian *ad litem*.

The grave question in this case is whether an accounting is necessary before an action at law can be maintained upon the bond given by the sureties on the occasion of their principal being appointed general guardian. That question has been left in a good deal of doubt for some time and until a recent decision in the Court of Appeals. (*Hood v. Hood*, 85 N. Y. 561; 73 id., 574.)

This bond is substantially as was required under the Revised Statutes by the act of 1837 in regard to administrators and

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guardians, which statutes have been substantially re-enacted in and form various sections of the Code. The conditions of a bond given by an administrator and the conditions of a bond given by a general guardian are the same in terms so far as the condition or liability of the sureties is concerned. They differ in this, that, while the condition is the same, one runs in terms to the People, and the other runs to the ward by name, notwithstanding the obligations that are assumed by the sureties for the appointment of an administrator and general guardian are the same. It has been held for a long time that sureties upon a bond given for the faithful performance of an administrator could not be sued at law on the bond, and could not be sued until there had been an accounting before a surrogate, or formerly, in chancery, a decree or order made establishing the default and extent of the deficiency. There are cases to the same effect in regard to the bond of a general guardian that, before an action can be brought upon his bond at law, there should be the same kind of an accounting, decree or order determining the same essential facts as in the case of an administrator. The question remained in doubt in respect to an action upon an administrator's bond until the decision in the case of *Hood v. Hood* (85 N. Y.), above referred to. In the action of *Hood v. Hood* the plaintiff sought to compel an accounting by an executor who had been required to give security, and that security was in the form of an ordinary bond given by an administrator, to determine the amount of funds that had been misapplied and converted to the executor's use, and, at the same time and in the same action, to compel his sureties to pay the sum which might be found owing from him and which could not be collected from him. This case reviews a great number of cases arising under the obligations of an administrator and his sureties to the estate he represents; and, inasmuch as the bond of the executor is required by statute, and as executed in that case, it was held the same rules apply to bonds of an executor as to bonds of an administrator. If the same rules apply to executors or administrators whose bonds are the same, and the same as a guardian's bond, why

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do they not apply to the general guardian's bond? The result of the authorities is that no action at law can be maintained against the sureties of an executor or administrator except in case of disobedience of some order of the surrogate, and after he should have authorized the prosecution of the bond. Now, inasmuch as the condition and purposes of a general guardian's bond are the same as an administrator's bond, we should expect the same conditions, which have been decided to be necessary before an action can be brought upon an administrator's bond, are also necessary to be observed before bringing an action upon a general guardian's bond.

The Court of Appeals have reiterated that doctrine, in regard to administrators' bonds, in the case of *Haight v. Brisbin* (100 N. Y. 219). We find in other courts that there are several cases, and more especially the case of *Bieder v. Steinhauer* (15 Abb. N. C. 428), where it was distinctly held by Judge RUMSEY that an action cannot be brought upon a bond given on the appointment of a general guardian for an infant until there had been an accounting and a decree in the same manner and of the same character as we have before seen is required prior to suing sureties upon an administrator's bond. While this is a general rule, I am satisfied in respect to the sureties upon an administrator's bond, and upon the bond given by sureties upon the appointment of a general guardian, there have been intimations that in some cases that there may be exceptions to the rule, yet I find no case where extraordinary circumstances have taken a case out of the general rule, nor what extraordinary circumstances would suffice to take a case out of the rule. In the case under consideration, there is no allegation of extraordinary circumstances or peculiarities, but the action is brought against the sureties upon the bond, and the other allegation that the bond has been broken and forfeited by reason of waste or devastation of the estate committed by the general guardian.

I am, therefore, forced to the conclusion that this judgment cannot be sustained. However apparent it is that a great wrong, so far as the evidence discloses, has been done to the plaint-

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iff's ward, her remedy is not gone, but it may subject her to the costs of this action in order to obtain her rights in another action more properly brought.

My conclusion, therefore, is that this judgment must be reversed and a new trial granted.

BROWN, J. The appellant makes two points against the judgment recovered in this action. First, that the plaintiff cannot maintain the action, but that it should have been brought in the name of the infant; second, that an action at law cannot be maintained against the sureties upon the bond of a general guardian until proceedings for an accounting have been had against the guardian. The first point must be deemed to have been waived, it not having been taken by demurrer or answer. (Code, § 499.)

The appellant argues that the objection is one going to the cause of action, and cites numerous authorities in support of his position. None of them sustain him. All of them except one arose upon a demurrer to the complaint. The only one in which the question was raised upon the trial was the *Bank of Havanna v. Wickham* (16 How. Pr. 97). In that case the General Term held that the capacity of the plaintiff to sue was independent of the cause of action, and that the objection that the action could not be maintained in the name of the Bank of Havanna, not having been taken by demurrer or answer, was waived.

This case, *sub nomine Bank of Havanna v. Magee*, was reversed by the Court of Appeals (20 N. Y. 355), but upon another ground, the court saying: "The objection is not that the plaintiff has not capacity to sue, but that no person, natural or artificial, is named as plaintiff. Certain persons, as infants, idiots, lunatics, etc., cannot sue except by guardians, next friends, committee, etc. This, I think, is what the provision (of the Code) refers to."

Numerous cases can be cited holding directly to the contrary of the appellant's contention. In *Phoenix Bank v. Donnell* (40 N. Y. 414) it is said that the objection that the facts stated in

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the complaint do not constitute a cause of action has no application to the question as to the capacity of the plaintiff to sue.

In *Palmer v. Davis* (28 N. Y. 242) it was held that, previous to the amendment of section 114 of the Code in 1857, an objection that a wife has no capacity to sue except by a next friend, if not taken by demurrer, was waived. In *Fulton Fire Insurance Company v. Baldwin* (37 N. Y. 648) it was held that an objection that the complaint does not show the plaintiff's capacity to sue cannot be raised by a demurrer taken on the ground that the complaint does not state facts constituting a cause of action. (See, also, *Town of Pierrepont v. Lovelass*, 4 Hun, 696; *Barclay v. Quicksilver Min. Co.*, 6 Lans. 25; *Mosselman v. Caen*, 21 How. Pr. 248, opinion by CLERKE, J.) Section 488 of the Code distinctly specifies as one of the grounds of demurrer that the plaintiff has not legal capacity to sue, and this would be wholly unnecessary if the question could be raised under the objection that sufficient facts were not stated in the complaint to constitute a cause of action. The precise objection now made appeared on the face of the complaint. The care and management of infant estates are subjects of statutory regulations, as are also the manner and form in which actions by and against infants must be prosecuted.

The question in this case was, can a general guardian sue in behalf of his ward for injury to his ward's estate? That is, has he the power and authority in law or, in the language of the Code, "the legal capacity" to maintain such an action. This was a pure question of law and could have been raised by demurrer. Whether the guardian's bond was made to the People or to the infant was of no consequence, nor am I able to perceive that the plaintiff could have acquired any rights under section 747 or 814 of the Code which would have enabled him to maintain the suit, and the allegation of the complaint showed that no right to maintain the suit was claimed under section 2608.

I think, therefore, that the objection that the plaintiff could not maintain the suit was waived. The judgment must, how-

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ever, be reversed upon the second ground stated. This question was very fully examined in the case of *Hood v. Hood* (85 N. Y. 561), in which it was sought to charge the sureties for their principal's default on a bond given by a non-resident executor. It was there decided, after a full review of all the authorities, that the default of an executor or administrator must be established in a proper proceeding against him before the sureties can be prosecuted upon the bond. To the same effect is *Haight v. Brisbin* (100 N. Y. 219). The respondent has endeavored to distinguish the cases cited from the one under consideration, but I think the reason of the rule applies with equal force to actions upon guardian's bonds. It was so decided in *Salisbury v. Van Hoesen* (3 Hill, 77) and in *Stillwell v. Mills* (19 Johns. 303), and both of these cases were cited with approval in *Hood v. Hood*. The fact of the death of the former guardian cannot take the case out of the rule, as his personal representatives may be required to account. (Code, § 2606.) The learned counsel for the respondent has cited cases holding that the administrator of the deceased guardian can only be compelled to account if he has property of the ward in his hands. (*Maze v. Brown*, 2 Dem. 217; *Schofield v. Adriance*, 2 id. 486.) These decisions were made before the amendment to section 2606, in 1884. (Chap. 399.) Subsequent to that amendment the learned surrogate of New York county entertained an application to compel an executor of a deceased executor to account, and his decree was sustained by the General Term. (*In re Fithian*, 44 Hun, 457.) In that case it was held that the purpose of the amendment was to develop all that the executor knew or could learn about the trust estate and in reference to it. We concur in this opinion. Undoubtedly no decree could be made against the administrator, if the petition to the surrogate failed to allege or the proof failed to show property of the infant in the administrator's possession. But before the sureties on the bond can be sued proceedings in the Surrogate's Court must, at least, establish the fact that none of the infant's property has come into the administrator's possession. In the absence of a

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decree to that effect, the presumption would be that the administrator has possession of the infant's estate, and until it is otherwise established a devastavit will not be presumed.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur. FOLLETT, Ch. J., concurs in the result on the ground that an accounting in the Surrogate's Court must be had before a judgment can be recovered against the sureties of the defaulting guardian.

Judgment reversed.

WILLIAM D. LEONARD, as Receiver, Appellant, v. ABRAM POOLE, Impleaded, etc., Respondent.

114	371
150	110
114	371
145	274

Where a number of persons and firms have conspired together, in violation of the statutes (2 R. S. 692, § 8, sub. 6; Penal Code, § 168), to do acts injurious to trade, for instance, to unlawfully advance the price of an article of food, the courts will not intervene in favor of any one of the parties to give him redress for frauds perpetrated by another to his detriment in carrying out the unlawful enterprise.

It does not affect the question that the party complained of as guilty of the fraud was acting as agent for the others. All those who knowingly promote and participate in carrying out a criminal scheme are principals, and the fact that one acts, in some respects, in subordination to the others, does not render him less a principal.

Where, therefore, a broker, who was one of the parties to an unlawful scheme to advance the price of lard, but who acted in carrying out the scheme simply as agent for the others, was proved to have defrauded his principals, *held*, that an action to compel him to account was not maintainable; that the courts would not aid in adjusting differences arising out of and requiring an investigation of the illegal transactions.

Reported below, 23 J & S. 213.

(Argued March 28, 1889; decided June 4, 1889.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 10, 1888, which affirmed a judgment in favor of

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defendant Abram Poole, entered upon an order dismissing the complaint as to him on trial.

This action was for an accounting.

Between August 13, 1879, and February 9, 1880, defendants Elmore A. Kent and Abram Poole were partners, under the name of E. A Kent & Co., and engaged in buying and selling produce on commission at New York and Chicago. Between the same dates Henry C. Butcher, Howard Butcher and Henry P. Darlington were partners, under the name of Washington Butcher's Sons, and engaged in the same business at Philadelphia and Chicago. Between the same dates Darius Miller and Nathan G. Miller were partners, under the name of D. & N. G. Miller, engaged in the same business at New York and New Britain, Connecticut. Between the same dates James R. Keene was engaged in business at New York. These firms and said Keene executed and delivered to E. A. Kent & Co. the following contract on the day of its date:

"The undersigned, each for himself and not for the others, hereby agree to form a pool or combination for the purpose of buying and selling one hundred and twenty thousand tierces of lard, and to receive and pay for the amounts set opposite their respective names, to wit, James R. Keene, forty thousand tierces; Washington Butcher's Sons, forty thousand tierces; D. & N. G. Miller, twenty thousand tierces; E. A. Kent & Co., twenty thousand tierces; and the said parties, each for himself, authorizes and empowers E. A. Kent & Co., in consultation and with the approval of Jas. R. Keene, N. G. Miller and Henry C. Butcher (parties hereto), to purchase and sell at their discretion, or that of a majority of them, the aforesaid quantity (one hundred and twenty thousand tierces), each agreeing to be responsible for the amount set opposite their respective names, and no more; any profit or loss arising from said purchases and sales to be divided *pro rata* among the subscribers hereto; and the said parties hereby agree to furnish, on demand, to E. A. Kent & Co., a margin of not less than one dollar per tierce for each and every tierce purchased, and further additional margins, if required, by any

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decline in the market-value thereof. And, whereas, James R. Keene is the present owner of fifty thousand tierces of lard, Washington Butcher's Sons of forty thousand tierces and D. & N. G. Miller of sixteen thousand tierces. Now, for and in consideration of the sum of one dollar to each of the aforesaid parties paid by E. A. Kent & Co., and for other valuable considerations, receipt of which is hereby acknowledged, the aforesaid James R. Keene, W. Butcher's Sons and D. & N. G. Miller agree and bind themselves to hold, tie up and effectually withdraw from market, so that the same cannot be sold during the continuance of this agreement without the written consent of all the parties hereto, the aforementioned number of tierces of lard, to wit, Jas. R. Keene, 50,000; W. Butcher's Sons, 40,000; D. & N. G. Miller, 16,000; and from time to time, when demanded by E. A. Kent & Co., to furnish the said E. A. Kent & Co. with evidence satisfactory to them that the said number of tierces of lard are withheld from market and in possession of the aforesaid parties, respectively; and it shall be the duty of said E. A. Kent & Co. to obtain such evidence of possession whenever required by either of the parties hereto. It is further understood and agreed that this agreement, in all its provisions and requirements, shall remain in full force and effect until the aforesaid one hundred and twenty thousand tierces of lard have been accumulated and sold, unless sooner dissolved by the consent in writing of all the parties hereto.

"NEW YORK, August 13th, 1879.

"JAMES R. KEENE 40,000 tierces of lard.
"WASHINGTON BUTCHER'S SONS, 40,000 tierces of lard.
"D. & N. G. MILLER..... 20,000 tierces of lard.
"E. A. KENT & CO. tierces of lard."

The court found that at the date of this contract it was agreed, between the signers, that E. A. Kent & Co. were not to be interested as principals in the transaction, but were to make the purchases and sales as brokers. The court also found that shortly after the above contract was executed the

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following contract was executed and delivered, by the signers thereto, to E. A. Kent & Co., the existence of which was unknown to James R. Keene :

“ For and in consideration of the payment to us, the undersigned, one-half each by E. A. Kent & Co., of any and all profits realized from the purchase and sale of twenty thousand (20,000) tierces lard, or any part thereof, E. A. Kent & Co.’s shares of a total of one hundred and twenty thousand (120,000) tcs. lard, as set forth in a certain agreement made on the 13th day of August, by and between E. A. Kent & Co., D. & N. G. Miller, Washington Butcher’s Sons and Jas. R. Keene, we, the undersigned, respectively, D. & N. G. Miller and Washington Butcher’s Sons, hereby guarantee and assume all loss, as against said E. A. Kent & Co., on ten thousand (10,000) tcs., each, arising from said transactions.

“ WASHINGTON BUTCHER’S SONS.

“ D. & N. G. MILLER.

“ Witness :

“ E. A. KENT.”

For the purpose of carrying out their contract Keene, Washington Butcher’s Sons and D. & N. G. Miller furnished large sums of money to E. A. Kent & Co., with which they from time to time, between August 13, 1879, and January 31, 1880, bought and sold, on the produce exchanges of New York and Chicago, futures and options in lard ; and also bought large quantities of lard some of which was, from time to time, sold. The sales of options, futures and of lard were made, in a way, to and for the purpose of causing the price of lard to fall, so as to enable the pool to purchase it at satisfactory prices, withdraw it from the market, and thereby greatly increase the market-price. Many purchases and sales were made upon the approval of James R. Keene, N. G. Miller and Henry C. Butcher, or a majority of them, but many were made by E. A. Kent & Co. without such approval, and upon their own judgment.

During the period covered by these transactions E. A. Kent

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& Co. from time to time delivered to James R. Keene statements of the purchases and sales made for the parties interested. Many of the purchases and sales entered upon these statements were not descriptive of actual transactions, but described alleged sales by themselves to themselves; and purchases by themselves from themselves, upon which alleged transactions commissions were charged, which facts were not disclosed by the statements nor in any other way. January 31, 1880, the defendants furnished said Keene with a summary statement of the alleged transactions, which showed \$133.09 due from them to him (aside from a difference in interest), and February 6, 1880, they sent him a check for this amount, and February 9, 1880, they sent him a check for \$127.95, the alleged difference in interest. These checks were retained and collected, but were not accepted in settlement. The court found that the statements were fraudulent, and that a much larger sum was due Keene from the defendants than was shown by their statements; but that the parties having engaged in an unlawful conspiracy, the court would not adjust their differences, and dismissed the complaint, with costs.

Stephen H. Olin for appellant. Unless the plaintiff's right to recover is destroyed by the illegality of the contract, he was entitled to judgment for an accounting. (Story's Eq. Jur. §§ 462, 464, 468; *Marston v. Gould*, 69 N. Y. 220; *Marvin v. Brooks*, 94 id. 71; *Fairchild v. Valentine*, 7 Robt. 564; *Boody v. Drew*, 2 T. & C. 69.) Money paid to an agent under an illegal agreement becomes the property of the principal in the agent's hands, for which he should account. He has no right to refuse payment to his principal because his principal had not a legal claim for the money on the agreement. (*Murray v. Vanderbilt*, 39 Barb. 140; *Merritt v. Millard*, 4 Keyes, 268; *Berkshire v. Evans*, 4 Leigh. 233; *Tenant v. Elliot*, 1 B. & P. 3; *Farmer v. Russell*, 1 id. 296; *Bonsfield v. Wilson*, 16 M. & W. 185; *Keicert v. Rindskopf*, 46 Wis. 485; Broom's Legal Maxims, 567, 568; *Anderson v. Moncrieff*, 3 Des. Eq. 124, 125.) Where an illegal transaction

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has taken place, the agent who has received the money on the part of the principal shall not shelter himself from the payment of it to his principal under the pretense of the illegality of the original transaction. (*Tenant v. Elliot*, 1 B. & P. 3; *Planters' Bank v. Union Bank*, 16 Wall. 483, 499; *Heckman v. Swartz*, 50 Wis. 267; *Keiwert v. Rindskopf*, 46 id. 481; *Wood on Master and Servant*, § 202; *Anderson v. Moncrieff*, 3 Des. 126; *Brooks v. Martin*, 2 Wall. 79; *Gilliam v. Brown*, 43 Miss. 641; *Mann v. Kelly*, 5 Fed. Rep. 564; *Woodward v. State*, 2 N. E. R. 321; *U. S. E Co. v. Lucas*, 35 Ind. 361; *Rotherock v. Perkins*, 61 id. 39; *State v. Tunney*, 81 id. 559; *Sharp v. Taylor*, 2 Philips' Ch. 301; *McBlair v. Gibbs*, 17 How. [U. S.] 232, 237; *Cook v. Sherman*, 20 Fed. Rep. 167; *Lemon v. Crosskopf*, 22 Wis. 447; *Owen v. Davis*, 1 Bailey, 316; *Frost v. Plumb*, 40 Conn. 111, 113; *Parsons v. Randolph*, 8 West. 863; *T. N. Bk. v. Harrison*, 10 Fed. 243, 250; *Willson v. Owen*, 30 Mich. 474; *Baldwin v. Potter*, 46 Vt. 402; *Greenhood on Pub. Pol.* 98, 101, 102.)

Joseph H. Choate for respondent. The agreement under which were carried on the transactions in controversy is contrary to public policy and void. (Greenh. on Pub. Pol. 642; *Arnot v. P., etc., C. Co.*, 68 N. Y. 558, 566; *S. C. Bk. v. King*, 44 id. 87; *M. R. C. Co. v. B. C. Co.*, 68 Penn. St. 173; *Hooker v. Vandewater*, 4 Denio, 352; *Samson v. Shaw*, 101 Mass. 145; *Craft v. McConoughy*, 79 Ill. 346; *Clancy v. O. F. S. Mfg. Co.*, 62 Barb. 895; *Wright v. Ryder*, 36 Cal. 342.) The plaintiff has no standing in equity to compel an accounting in respect of transactions carried on to create a corner in the lard market, or to force an advance in the price of lard. (Greenh. on Pub. Pol. 96, 97, 100, 106, 110; *Woodworth v. Bennett*, 43 N. Y. 273, 277; *Kelly v. Develin*, 58 How. Pr. 487; *Ralfe v. Delmar*, 7 Robt. 80; *Chappell v. Wysham*, 4 H. & J. 560; *Campbell v. Anderson*, 2 Dur. 384; *Thorne v. T. Ins. Co.*, 80 Penn. St. 15; *Clements v. Yturria*, 81 N. Y. 285; *Armstrong v. Toler*, 11 Wheat. 258; *Steers v. Laishby*, 6 T. R. 61; *Dunbar v. Johnson*, 108 Mass. 519; *M. R. C.*

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Co. v. B. C. Co., 68 Penn. St. 173; *Craft v. McConoughy*, 79 Ill. 346; *Oscanyan v. Arms Co.*, 17 Am. L. Reg. [N. S.] 626, 633; 103 U. S. 261; *Keiwert v. Rindskopf*, 46 Wis. 481; *Merritt v. Millard*, 4 Keyes, 208; *Anderson v. Moncrieff*, 3 Desaus. Eq. 124; *Sharp v. Taylor*, 2 Ph. Ch. 801; *Cook v. Sherman*, 20 Fed. Rep. 167; *Sikes v. Beeson*, L. R., 11 Ch. Div. 170; *Kine v. Kent*, 7 N. Y. State Rep. 229.) Upon the uncontested facts the final account which, on January 31, 1880, respondent's firm rendered to Keene became a stated and settled account. (*McPherson v. Small*, 41 N. Y. Super. Ct. 537; *Bruen v. Hone*, 2 Barb. 586; *Phillips v. Belden*, 2 Edw. Ch. 1; *Lockwood v. Thorne*, 18 N. Y. 285; 11 id. 170; *Hutchinson v. Market Bk.*, 48 Barb. 302; *Koch v. Bonitz*, 4 Daly, 117.) To an action brought for an accounting, an account stated and settled is an absolute bar. (52 How. Pr. 382-385; Story's Eq. Pl. 800; *Stoughton v. Lynch*, 2 Johns. Ch. 217; *Laycraft v. Dempsey*, 15 Wend. 83; *Chubbuck v. Vernam*, 42 N. Y. 432; *McIntyre v. Warren*, 3 Abb. Ct. App. Dec. 99; *Harley v. Eleventh Ward Bk.*, 76 N. Y. 618; *Wilde v. Jenkins*, 4 Paige Ch. 481; *Ogden v. Astor*, 4 Sandf. 312.)

FOLLETT, Ch., J. When the transactions out of which this action arose were being carried on the statutes of this state provided that if two or more persons conspire to commit any act injurious to trade or commerce, each of them is guilty of a misdemeanor. (2 R. S. 692, § 8, subd. 6.) The same provision is contained in the Penal Code, section 168. The scheme entered into by the parties to the contract of August 13, 1879, was an indictable misdemeanor. (2 R. S. 692, § 8; *People v. Fisher*, 14 Wend. 9; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 id. 434; *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558, 565; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173.) The scheme which the parties to the contract for a time pursued, and sought to consummate, was identical with the one described in the contract,

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and equally criminal. That Keene, Washington Butcher's Sons and D. & N. G. Miller agreed to engage, and actually engaged, in an unlawful plot to advance the price of lard cannot be successfully denied, and the courts of this state will not entertain an action to adjust their differences. This proposition is well settled ; and we do not understand that the learned counsel for the appellant gainsays it, nor does he assert that the rule would not be applicable to a case arising between those parties and out of these transactions. The learned counsel for the appellant insists that Kent & Co. were not principals, but were mere agents for the principals, and that they cannot avoid payment upon the ground that the transactions were illegal. When persons knowingly promote and participate in carrying out a criminal scheme they are all principals, and the fact that one of the parties acts, in some respects, in subordination to the others, and is to profit less than the others, or not at all, by the consummation of the scheme, does not render such person less a principal.

This rule is elementary, and does not require elaboration or the citation of authorities. Throughout the period covered by the transactions these defendants bought and sold lard and futures and options in lard, and actively engaged in the attempt to carry out the unlawful enterprise. If, at the close of their transactions, Keene and his associates had been found to be owing Kent & Co., we think it very clear that the illegality of the enterprise would have been a perfect defense to an action brought by Kent & Co. to recover the sum due. (*Bartlett v. Smith*, 13 Fed. Rep. 263; *Cobb v. Prell*, 15 id. 774; *Irwin v. Williar*, 110 U. S. 499.) In the case last cited Mr. Justice MATTHEWS, in speaking for a unanimous court, said : "In *Roundtree v. Smith* (108 U. S. 269), it was said that brokers who had negotiated such contracts, suing not on the contracts themselves, but for services performed and money advanced for defendant at his request, though they might under some circumstances be so connected with the immorality of the contract as to be affected by it, they are not in the same position as a party sued for the enforcement of the original

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agreement. It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." (110 U. S. 509.) Several cases have been cited holding that money or property deposited with a third person, which was derived from or through an unlawful enterprise, may be recovered; and that the illegality of the transaction out of which the money or property arose cannot be successfully asserted as a defense by a mere agent or depositary. This rule is well settled, but it is not germane to this case. Other cases are cited holding that when the parties to an illegal transaction have accounted, as between themselves, and agreed that a definite sum belongs to each, that an action may be maintained upon the accounting or new promise, and the sum, once admitted to be due, recovered. Admitting these cases to be well decided, they do not aid the appellant. These parties have had no accounting. No admission has been made that a specified sum is due to any one of them. No promise has been made since the completion of the illegal scheme upon which a recovery is sought. On the contrary, this action is for an accounting between the parties. It is alleged in the complaint that the amount which the plaintiff is entitled to recover is unknown, and can only be ascertained by an investigation of the illegal transactions between the parties. The judgment prayed for is: "That an account may be taken of all the dealings and transactions, purchases and sales of lard made and conducted by said defendants E. A. Kent & Co.. under the agreement hereinbefore mentioned," etc.

The relief sought would require the court to investigate all

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of the various transactions of these parties, from the beginning to the end of their unlawful enterprise, and adjust the differences between them. This is precisely what courts have always refused to do. The fraud which the trial court found was practised by these defendants upon their associates cannot be too strongly condemned, but courts are not organized to enforce the saying that there is honor among law-breakers, and the desire to punish must not lead to a decision establishing the doctrine that law-breakers are entitled to the aid of courts to adjust differences arising out of, and requiring an investigation of, their illegal transactions.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

HUBERT FRANCIS, Respondent, v. THE NEW YORK STEAM COMPANY, Appellant.

Defendant lawfully opened a trench in a city street parallel with the track of a street railroad company. It constructed a passage-way or bridge across this trench, with uprights at each end, which supported a hand-rail on each side. The uprights nearest the track of the railroad were higher than the sills of the windows of the street cars, and were about three or four inches from the side of a passing car. Plaintiff was a passenger upon the railroad in the summer time; he was sitting at an open window of a car and had his arm broken as the car passed the bridge. In an action brought to recover damages, plaintiff claimed that the bridge was so insecurely built that one of the uprights fell upon his arm, which was at the time within the car. Defendant claimed that the injury was caused by plaintiff's arm extending so far out of the window that it came in contact with the upright. The testimony upon this point was conflicting. It did not appear that plaintiff was warned to keep his arm inside the car, or that there was any circumstance or anything in the condition of the street which should have caused plaintiff to have anticipated danger. The court charged the jury that if plaintiff sat with his arm out of the window, and it thus came in contact with the upright and was broken, it would not defeat his right to recover unless they found that such conduct was negligent. Held, no error; that the question was, under the circumstances, one of fact for the jury.

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It seems there is a distinction in this respect between street and other railroads.

Also, *held*, that a defendant having a right to a limited use of the street was required to so exercise its right as not to unnecessarily endanger travelers; and that the question as to whether it had failed in this respect was properly submitted to the jury.

Reported below, 18 Daly, 510.

(Argued April 15, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made June 7, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

A few days before June 15, 1883, the defendant lawfully opened a trench parallel with and about twenty inches south of the south rail of the south track of the Sixth Avenue Street Railroad Company in Vesey street. This trench was three or four feet deep, six feet wide and its sides were sheathed with plank to prevent the earth from caving in. The defendant laid one or two plank across this trench, which formed the floor of what is called, in this litigation, a bridge. Uprights set at the angles formed by the floor of the bridge and the trench were nailed to the edge of the floor and a board was nailed to the uprights standing on each side of the bridge, called side-boards or hand rails, and were to prevent persons crossing the bridge from stepping or falling from it into the trench. The length of these uprights is not disclosed, but it does appear that the upper end of the two which stood on the north side of the trench were higher than the sills of the windows of the street cars. The north-edges of these uprights were about twenty inches from the south rail of the south track of the Sixth avenue road, but were only from three to four inches from the sides of the passing cars.

About half-past eight in the morning of June 15, 1883, the plaintiff was sitting on the right or south side of a Sixth

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avenue car which was going east in Vesey street, and as the car passed the so-called bridge his right arm came in contact with one of the uprights and was broken midway between the elbow and the shoulder. This action was brought to recover damages for this injury. The plaintiff asserted that the bridge was so insecurely built that one of the uprights fell upon and broke his arm. The defendant denied this and asserted that the injury was caused by plaintiff's arm extending so far through the window that it came in contact with the upright. The plaintiff testified that he sat by the car window engaged in reading a newspaper, with his arm lying against the window blind and wholly inside of the car. Two witnesses, sworn in behalf of the plaintiff, did not observe that his arm was out of the window. The conductor and driver of the car testified that the plaintiff's arm was out of the window, but how far they did not attempt to say.

The court charged that if the jury found that if the plaintiff sat with his arm out of the open window, and it was so brought in contact with the upright and broken, it would not defeat his right to recover unless they further found that such conduct was negligent. To this the defendant excepted and requested the court to charge that if the plaintiff's arm extended through the open window so that it came in contact with the upright and was thereby broken, he was guilty of contributory negligence and could not recover, which was refused and an exception taken. The jury found a verdict for the plaintiff and assessed his damages at \$500.

James W. Hawes for appellant. Even if the plank fell into the car, that fact alone proves no negligence on defendant's part. (Shearman & Redfield on Negligence, § 12.) The burden of proof of negligence is on plaintiff. (*Desmond v. Rose*, 46 N. Y. Super. Ct., 569; *Cordell v. N. Y. C. & H. R. R. R. Co.*, 75 N. Y. 330; *Manzoni v. Douglas*, 29 Week. Rep. 425; *Hart v. H. R. Bridge Co.*, 84 id. 56; *Riceman v. Havemeyer*, Id. 647; *Holbrook v. U. & S. R. R. Co.*, 12 id. 236; *Hayes v. Forty-second St., etc., R. R. Co.*, 97 id. 259.)

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Plaintiff cannot recover on facts as consistent with care and prudence as the opposite. (*Wilson v. N. Y. C. & H. R. R. Co.*, 97 N. Y. 87; *Crafts v. Boston*, 109 Mass. 519, *Tolman v. S. B. & N. Y. R. R. Co.*, 98 N. Y. 198, 203; *Burke v. Witherbee*, Id. 562, 565; *P. P. R. Co. v. Lauterbach*, 41 Leg. In. 401; *P. & C. R. R. Co. v. McClurg*, 56 Penn. St. 294, 296.) The court should have charged, as a matter of law, that if the plaintiff had his arm out of the window he could not, under the circumstances of this case, recover. (Beach on Contributory Negligence, 158-171, §§ 54-56; *P. & C. R. R. Co. v. McClurg*, 56 Penn. St. 294, 296; *Todd v. O. C. & F. R. R. Co.*, 85 Mass. 18; *I. & C. R. R. Co. v. Rutherford*, 29 Ind. 82; *L. & N. R. R. Co. v. Sickings*, 5 Bush, 1; *P. & C. R. R. Co. v. Andrews*, 39 Md. 329; *Dun v. S. & R. R. Co.*, 78 Va. 645; Redfield's Am. Ry. Cases, 552, note; Patterson's Railway Accident Law, 284, § 273; *Holbrook v. U. & S. R. R. Co.*, 12 N. Y. 236, 244; *Hallahan v. N. Y., L. E. & W. R. R. Co.*, 102 id. 194; *Breen v. N. Y. C. & H. R. R. Co.*, 109 id. 297; *Dale v. D., L. & W. R. R. Co.*, 73 id. 468; *Willis v. L. I. R. R. Co.*, 34 id. 670; *Buel v. N. Y. C. R. R. Co.*, 31 id. 314; *Edgeton v. N. Y. & H. R. R. Co.*, 39 id. 227; *Eaton v. D., L. & W. R. R. Co.*, 57 id. 382; *L. V. R. R. Co. v. Greiner*, 113 Penn. St. 600; *C. & A. R. R. Co. v. Hoosey*, 99 id. 492; *S. L. & S. F. R. R. Co. v. Marker*, 41 Ark. 542; *P. P. R. R. Co. v. Lauterbach*, 41 Leg. In. 401; *G. P. R. Co. v. Brophy*, 105 Penn. St. 38; *Miller v. S. L. R. R. Co.*, 5 Mo. App. 471; *Dahlberg v. M. S. R. R. Co.*, 32 Minn. 404; *Summers v. C. C. R. R. Co.*, 34 La. An. 139.) The New York cases relative to riding on the platform turn on the implied permission of the company and the fullness of the car, and carry the implication that, unexplained, it is negligence to ride on the platform. (*Spooner v. B. C. R. R. Co.*, 54 N. Y. 230; *Ginna v. S. A. R. R. Co.*, 67 id. 596; *Nolan v. B. C. & N. R. R. Co.*, 87 id. 63; *Clark v. E. A. R. R. Co.*, 36 id. 135; *Wills v. L. & B. R. R. Co.*, 129 Mass. 351; *Downey v. Hendrie*, 46 Mich. 498; *Ashbrook v. F. A. R. Co.*, 18 Mo.

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App. 290; *Chave v. N. Y. & H. R. R. Co.*, 15 N. Y. S. R. 966.)

Julius H. Seymour for respondent. The question of contributory negligence was for the jury. (*Parker v. Jarvis*, 1 T. App. 88; *Godfrey v. Johnston*, 1 Keyes, 566; *Finch v. Parks*, 49 N. Y. 1; *Monell v. Peck*, 88 id. 398; *Easterly v. Cole*, 3 id. 502.) A passenger is to be allowed a reasonable measure of liberty, and whether he has exceeded his right is a question of fact. Whether the act of standing on the platform is negligence, or getting off the car whilst it is in motion is negligence, is a question for the jury. (Whart on Neg. 365, 370; *Musel v. R. R. Co.*, 8 Allen, 234; *Eppendorf v. B., C. & N. R. R. Co.*, 69 N. Y. 195; S. & R. on Neg. § 282.) It is not negligence *per se* for a passenger to rest his arm on a window sill which is substantially the top of the back of the seat. (*Brophy v. G. R. R. Co.*, Penn. S. C. [1884], 14 W. N., case 213; 29 Alb. L. Jour. 222; Whart on Neg. § 362; Hutch. on Car. § 659; Thomp. on Car. § 258; Aug. on Car. [5th ed.] 514, note; *Segel v. Eisen*, 41 Cal. 109; *Miller v. St. Louis R. Co.*, 5 Mo. App. 471; *Spencer v. R. R. Co.*, 17 Wis. 487.) Whether the position of the passenger is a proper and prudent one is not necessarily a question of law. (*Lyman v. Union R. R. Co.*, 114 Mass. 83, 88; *Dahlburg v. M. R. R. Co.*, 31 Alb. L. Jour. 335.) Resting the arm on the window sill, in consequence of which, by a sudden jolt in the car, it is thrown out and broken, is not negligence in law. (*Brophy v. G. P. R. Co.*, 14 W. N. 213; 29 Alb. L. Jour. 222.)

FOLLETT, Ch. J. The court did not err in refusing to dismiss the complaint or in refusing to direct a verdict for the defendant.

Whether the upright fell upon the plaintiff's arm, and whether its fall was caused by the defendant's negligence, and whether the plaintiff's arm was inside or outside of the car were questions for the jury, and if found in the plaintiff's favor, he was entitled to a verdict.

The principal question discussed on this appeal is whether

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the court erred in instructing the jury that if they found that the plaintiff's arm was out of the window when injured, it was a question of fact for them to determine, whether, under the circumstances of this case, he was guilty of contributory negligence.

When passengers upon railroads operated by steam have received injuries to their arms by reason of their protrusion from open windows, and have sought to recover damages against their carriers, it has been held in some of the reported cases that such protrusion is, as matter of law, contributory negligence; while in others it has been held that whether it is negligence is a question of fact. This question does not seem to have been determined by any of the appellate courts in this state, unless it can be said to have been passed upon in *Holbrook v. Utica & Schenectady Railroad Company* (16 Barb. 113; 12 N. Y. 244). Whether the arm of the plaintiff in the case cited rested on the sill of the car window or projected through the window was a disputed question. The court charged: "That the company only contracted to carry her safely when she kept within the cars; that it was for the jury to say whether her elbow was out of the cars at the time of the injury, and if it was, it was a circumstance or fact from which they might infer negligence or want of ordinary care on her part. The judge was then requested by the defendant's counsel to charge, as matter of law, that if they found that the plaintiff's arm or elbow was outside of the window of the car when the injury was received, it was an act of negligence and she could not recover; but the judge refused to charge on that subject other than he had charged, to which refusal the defendant excepted." Judge RUGGLES, speaking for the court, said: "In this refusal to charge as requested I was at first inclined to think there was error. But my brethren are unanimously of opinion that the judge had already charged the jury substantially in conformity with the request, and that he was right, therefore, in declining to repeat what he had before stated. I yield to their judgment on this point, and

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concur in affirming the judgment." It is apparent that the jury had not been charged substantially in conformity with the request, but they had been instructed that it was a question for them to determine whether the plaintiff's elbow was inside or outside the window; and if it was outside it was a circumstance or fact from which they might infer negligence or want of ordinary care on the plaintiff's part. The jury found a verdict for the plaintiff, upon which a judgment was entered, which was affirmed by the General Term and by the Court of Appeals. The judgment in this case is to the effect that whether the plaintiff was negligent in riding with her arm out of the window was not a question of law, but of fact.

In *Dale v. Delaware, Lackawanna and Western Railroad Company* (73 N. Y. 468) the court charged that if the plaintiff negligently, whether consciously or unconsciously, put his arm outside of the window, and thus contributed to the injury, he could not recover; but if his arm, while resting on the sill, was thrown out by a sudden lurch of the car, that fact would not defeat his right to recover. The plaintiff had a verdict, on which a judgment was entered, which was affirmed at General Term, but was reversed by the Court of Appeals for an error in the admission of evidence, the validity of the instruction not being considered. In *Hallahan v. N. Y., L. E. & W. R. R. Co.* (102 N. Y. 194), and in *Breen v. N. Y. C. & H. R. R. R. Co.* (109 id. 297), the records show that the jury in each case was instructed that if they found that the plaintiff was riding with his arm protruding from the open window, it was contributory negligence, and no recovery could be had. The plaintiff recovered a verdict in each case, and the validity of the instructions was not, and could not be reviewed.

The courts of Massachusetts and Pennsylvania have held that it is negligent, as matter of law, for a railway passenger to ride with his arm extending through the window, and that no recovery can be had for an injury received by reason of the arm being in this position. (*Todd v. Old Colony & Falls River R. R. Co.*, 3 Allen, 18; 7 id. 207; *Pittsburgh & Connellsville R. R. Co. v. McClurg*, 56 Penn. St.

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294.) In other states it has been held that whether such conduct is contributory negligence is a question of fact. (See cases cited in Beach on Contrib. Neg. § 56; 2 Shear. & Red. on Neg. [4th ed.] § 519; 2 Wood's R. Law, 1103, § 303; Bishop's Non-contract Law, §§ 1106, 1107.)

In *Dahlberg v. Minnesota Street Railroad Company* (32 Minn. 404) and in *Summers v. Crescent City Railroad Company* (34 La. An. 139) it was held that whether a passenger upon a street car was negligent in riding with his arm out of the window was a question of fact. We are satisfied that a general rule, applicable to all cases, cannot be laid down, and that whether the question is one of law or fact must be determined by the circumstances of each case. Street railroads are operated under circumstances widely different; some in the crowded thoroughfares of large cities; others in streets little used in suburban districts and in villages. Conduct which would be declared negligent, as a matter of law in one case, might not be so in another. This conclusion brings us to the consideration of the question as to whether the evidence in the case at bar was such as to require the court to rule, as a matter of law, that if the plaintiff's arm was partly out of the window when injured, he negligently contributed to the accident, and could not recover. The accident occurred in the summer, when the windows of street cars are usually open, as the windows of this car were on this occasion. There were but nine or ten passengers in the car. The plaintiff sat in a seat, with his right arm lying on the window sill, wholly within the car, he testified, but partly without, as the conductor and driver testified; but they do not attempt to say how far his arm extended beyond the outside of the car. The evidence does not disclose that there was anything in the condition of the street, or that there was any circumstance which should have caused the plaintiff to have anticipated danger. Two of the defendant's witnesses, the conductor and the driver of this car, gave the plaintiff no warning; and the conductor testified that, though he saw that plaintiff's arm was out of the window, he

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did not know that he was in danger. This is not an action by a passenger against his carrier, between whom contractual relations exist and out of which reciprocal duties arise ; but it is an action against a defendant having a right to a limited use of the street, and required to exercise its right so as not to unnecessarily endanger travelers. We are of opinion that the evidence contained in the record would not have justified the court in charging, as a matter of law, that if the plaintiff's arm projected through the window, and beyond the outer edge of the car, he could not recover.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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**THE HONG KONG AND SHANGHAI BANKING CORPORATION,
Appellant, v. WILLIAM B. COOPER, Jr., Respondent.**

An agreement of parties to an action to limit judicial inquiry, when not unreasonable or against good morals or public policy, is binding upon the courts.

In September, 1883, defendant, who was the agent in New York of the firm of M., D. & Co., of Manilla, sold 4,000 bales of hemp, "to arrive," at a specified price, payable on arrival of the hemp at New York from Manilla. The contract of sale was made by defendant in his own name, but was intended to be on account of his principals, whom he immediately notified thereof. In October of that year M., D. & Co. shipped from Manilla, by the Polynesian, 4,000 bales of hemp, deliverable to their order in New York, intending the hemp to be used in fulfillment of said contract; they indorsed, in blank, the bills of lading therefor, which were made out to M., D. & Co., or order or assigns, and delivered them to plaintiff to secure the payment of five bills of exchange drawn by said firm, upon which plaintiff made advances to said firm. These advances were made, without any knowledge on the part of plaintiff of said sale by defendant. In December defendant received notice from M., D. & Co. that they had shipped the hemp by the Polynesian. In January, 1884, plaintiff, at the request of the drawees and acceptors of the bills of exchange, forwarded the bills of lading to its agent in New York, "to be delivered to defendant in exchange for his trust receipt." In February the drawers and drawees of the bills of exchange failed. In March plaintiff wrote to defendant inquiring whether the hemp on the Polynesian had been sold "to arrive." Defendant answered that it had, but soon after rescinded his "notice,"

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so-called, that this hemp had been sold, and stating that "the sales of hemp" were made in his name and he should treat them as made for his own account. On arrival of the Polynesian plaintiff, by virtue of the bills of lading, took possession of the hemp; the price had fallen so that it could then be purchased in the New York market at much less than the contract-price. Plaintiff demanded of defendant that he should deliver the hemp under the contracts, paying over to it the proceeds, less commissions and expenses, to the extent of its said advances, which defendant declined to do. Thereupon the parties agreed that defendant should receive the hemp, deliver it on the contracts, deposit a sum agreed upon as "profits," to await the determination of a litigation, pay over to plaintiff the balance, less commissions, etc.; the parties stipulating that should the court decide that defendant "had the right, as against" plaintiff, to deliver on his contracts other hemp purchased by him in these markets, judgment should be rendered in his favor for the amount so deposited. The hemp was thereupon received and delivered by defendant upon said contract; the amount paid over to plaintiff was insufficient to pay its advances. In an action to determine the rights of the parties to the deposit, *held*, that, as against plaintiff, defendant had the right to deliver other hemp than that in question, and so was entitled, under the agreement, to the deposit; that, assuming the contracts of sale, although made in defendant's name, were the acts and property of his principals, plaintiff had no interest in or control over them.

It seems that, had the said contracts provided for a delivery of the hemp to arrive by the Polynesian, a different question would have been presented.

(Argued April 16, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 1, 1886, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

In 1883 the firm of Martin, Dyce & Co. carried on a mercantile business at Manilla, in the Philippine Islands, and the firm of Martin, Turner & Co., composed of the same persons, carried on a banking business at Glasgow, Scotland. In September of that year the defendant, a commission merchant in New York and the agent of said firms, sold four thousand bales of hemp, "to arrive" during October and November following, at from ten and three-quarters to ten and five-eighths cents per pound, payable on arrival of the hemp at New York from Manilla, and at once notified Martin, Dyce & Co. of such sale which, although made in defendant's name,

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was intended to be on their account. On October twentieth Martin, Dyce & Co. shipped from Manilla, by a vessel known as the Polynesian, four thousand bales of hemp deliverable to their order in New York, indorsed the bills of lading received therefor in blank and delivered them to the plaintiff, a banking corporation doing business in New York, London and certain cities in Asia, to secure the payment of five bills of exchange drawn by the Manilla firm upon the Glasgow firm. The bills of lading were made out in the name of Martin, Dyce & Co., or order or their assigns. At the same time the plaintiff advanced to Martin, Dyce & Co. over £18,700 sterling upon said bills of exchange, which were afterward accepted by Martin, Turner & Co. and became payable about the 1st of June, 1884. Such advance was made without any knowledge by the plaintiff of said sale by the defendant, and without any expectation thereof or reliance thereupon. December twentieth the defendant received notice from Martin, Dyce & Co. that they had shipped the hemp by the Polynesian. On the 22d of January, 1884, Martin, Turner & Co. requested the plaintiff at London to forward to its agent at New York the bills of lading for said hemp "to be delivered to the defendant in exchange for his trust receipt." They were forwarded accordingly and were received by said agent on the 3d of February, 1884. It was the intention of Martin, Dyce & Co. when they shipped the hemp to use it to fulfill the contracts of sale made by the defendant. About February twenty-ninth the firms of Martin, Dyce & Co. and Martin, Turner & Co. became and have ever since remained insolvent, and they have not paid said bills of exchange nor the sum of over \$20,000 which they owed to the defendant at the date of their failure.

On the fifth of March the plaintiff wrote to the defendant inquiring whether the hemp on the Polynesian had been sold "to arrive." The defendant, who up to this time did not know of plaintiff's interest in the hemp, answered that it had been so sold for more than £4,000 over its value at that time, and that the contracts had been taken by him in his own name. On the tenth of March the defendant wrote

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to the plaintiff rescinding his "notice" so-called, that the hemp had been sold and stating that "the sales of hemp" were made in his name; that they "were intended for account of Martin, Turner & Co.," and that his relations with that firm demanded that he should treat the sales as for his own account. The plaintiff made no advance and incurred no liability on the faith of defendant's letter stating that he had sold the hemp, nor did it in any way change its position in reliance thereupon. In the meantime the price of hemp had so fallen that similar hemp could have been purchased in the market at New York for \$17,950 less than the contract-price. Upon the arrival of the Polynesian at New York on the eighteenth of March, the plaintiff, by virtue of the said bills of lading, took possession of the hemp on board thereof and shortly afterward demanded of the defendant that he should deliver that hemp in fulfillment of the said contracts made by him, and pay over the proceeds, after deducting his commissions and expenses, to the plaintiff to the full extent of its advances to Martin, Dyce & Co. upon the transfer and pledge of the bills of lading. The defendant declined to do this, claiming that he had the right to purchase other hemp in the market and deliver it upon his contracts and to apply the profit of \$17,950 in reduction of the amount which his insolvent principals were owing him, even if they had not authorized him to do so. Thereupon, in order that the benefit of the contracts might not be lost by delay, the parties agreed that the defendant should receive the hemp from the plaintiff, deliver it to the purchasers, deposit the amount of the "profits," fixed at \$17,950, with a trust company, and pay over the balance, less commissions and expenses, to the plaintiff on account of its said advances, leaving it to the courts to decide who was entitled to said fund. The defendant accordingly delivered said hemp to his vendees and received therefor the sum of \$112, 514.14, of which he retained \$6,471.91 "for commissions, marine insurance and sundry expenses;" deposited \$17,950 with the Union Trust Company, which agreed to allow interest thereon at the rate of one and one-half per cent per annum, and the remainder, \$88,090.23,

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he paid over to the plaintiff. After applying said amount upon the indebtedness of said firms to the plaintiff there was still unpaid \$22,352.57.

This action was brought to recover the fund so deposited; to procure an adjudication that the defendant is not entitled to any part thereof, and for a judgment against him personally for the net balance received upon the sale of the hemp. The referee before whom the action was tried, after finding the foregoing facts, in substance, also found that the sum of \$3,367.35, was paid by the defendant for marine insurance upon the hemp after the plaintiff had made said advance to Martin, Dyce & Co., and had received a transfer of the bills of lading, and that it was not paid by plaintiff's authority. The referee further found that in 1877 an agreement was entered into between Martin, Dyce & Co. and the plaintiff, which, after stating that the latter might, from time to time, purchase from, or negotiate for, said firm bills of exchange drawn or indorsed by it, with collateral securities, authorized the plaintiff, in case the drawees or acceptors of such bills during the currency thereof should suspend payment or become bankrupt, "to sell all or any part of the goods forming collateral securities," at such time and in such manner as the plaintiff should deem fit, to apply the net proceeds in payment of such bills, and the balance, if any, upon any other debt or liability of said firm to said bank; that "the transaction relative to the hemp by the Polynesian was had," under said agreement, and that before said vessel arrived, and prior to defendant's letter of March fifth, the event provided for by said clause had happened. The referee ordered judgment in favor of the plaintiff and against the defendant for said sum of \$3,367.35, retained by him for marine insurance paid, but awarded the fund of \$17,950, on deposit with the Union Trust Company, to the defendant.

Amasa A. Redfield for appellant. An interest may be created in a fund, in the nature of equitable property, obtained through what amounts to an equitable assignment, which

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interest may be enforced by an action, even though the depositary has not assented to the transfer. (*Field v. Mayor, etc.*, 6 N. Y. 179; *Brill v. Tuttle*, 81 id. 454; *East Lewisburg Co. v. Dunkel*, 91 Penn. St. 96; 3 Pom. on Eq. Jur. § 1280.) The facts establish an equitable assignment of the fund which the agent could not defeat. (3 Pom. on Eq. Jur. § 1283; Story's Eq. §§ 1040, 1055; *Brill v. Tuttle*, 81 N. Y. 454; *Munger v. Shannon*, 61 id. 251.)

John M. Bowers for respondents. There is no privity between the parties. The defendant owed the bank no duty; the bank had no claim on him. (*A. P. Co. v. Graffin*, 114 U. S. 492; *Colvin v. Holbrook*, 2 N. Y. 126; 2 Comst. 129; *Copperwaite v. Sheffield*, 3 N. Y. 243; *F. N. Bank v. Whitman*, 94 U. S. 343; *Atty.-Gen. v. C. L. Ins. Co.*, 71 N. Y. 325; *Etna Nat. Bk. v. Fourth Nat. Bk.*, 46 id. 82-87; *Raney v. Weed*, 3 Sandf. 577; *Hall v. Lauderdale*, 46 N. Y. 70; *Cobb v. Beckey*, 6 Q. B. 930; *Savings Bk. v. Ward*, 120 U. S. 195; *Robertson v. Fleming*, 4 Macq. H. of L. Cas. 167-209; *Winterbottom v. Wright*, 10 M. & W. 109; *Hills v. Snell*, 104 Mass. 173; *Ice Co. v. Potter*, 123 id. 28; *Fulton v. Jones*, H. & M. 564; *Stephens v. Babcock*, 3 B. & A. 354; *Denny v. Mfg. Co.*, 5 Denio, 639; Id. 115; *Mackersey v. Ramsey*, 9 Cl. & Fin. 818; *In re N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 447, 453.) The plaintiff was the absolute owner of the hemp. (*Moors v. Kidder*, 106 N. Y. 132; *Hale v. Smith*, 1 B. & P. 563; *First Nat. Bk. of Toledo v. Shaw*, 61 N. Y. 283, 296; *F. and M. Nat. Bk. v. Logan*, 74 id. 568.) There was no appropriation of this hemp for the fulfillment of particular purchases. (Edw. on Bailm. § 365; *Bank of Rochester v. Jones*, 4 N. Y. 497; *Mitchell v. Ede*, 11 Ad. & El. 888; *Winter v. Coit*, 7 N. Y. 288; *M. Bk. of Chicago v. Wright*, 48 id. 1.) The doctrine that a consignor who attaches a bill of lading to a draft drawn by him thereby indicates an intention to appropriate the proceeds of the sale of the goods therein mentioned to the payment of the draft has no application

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here. (*Bank of Rochester v. Jones*, 4 N. Y. 497; *Winter v. Colt*, 7 id. 288; *First Nat. Bk. v. Kelly*, 57 id. 37; *Cayuga Bk. v. Daniels*, 47 id. 631; *Field v. Mayor, etc.*, 6 id. 179; *Brill v. Tuttle*, 81 id. 454; *E. L. Co. v. Marsh*, 91 Pa. 96.)

VANN, J. The question presented for decision by the written agreement of the parties, as well as by their pleadings, is whether the defendant had the right, *as against the plaintiff*, "to deliver to the purchasers of said hemp, under the contracts aforesaid, other hemp than that received from Martin, Dyce & Co. or Martin, Turner & Co. from Manilla, to wit, hemp not received by the said ship Polynesian, but purchased by" the defendant "in the New York market at some time after the said bankruptcy of the said Martin, Turner & Co., and after the 1st of March, 1884; or whether, on the other hand, the said" plaintiff "was entitled to demand, *as against the defendant*, that the 4,000 bales of hemp received by the Polynesian from Manilla, aforesaid, should be delivered under and in fulfillment of the said contracts of sale and the proceeds thereof applied in satisfaction of their advances against such hemp?" The agreement further provided that in case the court should finally decide that the defendant "had the right, as against the" plaintiff, "to substitute such other hemp purchased by him in open market after the times aforesaid for the hemp received from Martin, Dyce & Co., as aforesaid, judgment shall be in his favor for the amount so deposited with the trust company, and in case the court shall finally decide that he had not such right of substitution, judgment shall be rendered in favor of the" defendant "for the amount so deposited."

The parties by thus defining the question and prescribing the remedy have confined discussion to narrow bounds. The rights of third persons, however apparent or important, are expressly excluded from consideration. We are asked to pass upon the right of the defendant, simply as against the plaintiff, to substitute other hemp in performance of the contracts; and, conversely, upon the right of the plaintiff, simply

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as against the defendant, to demand that its hemp only should be used for that purpose. The agreement of the parties to thus limit judicial inquiry is binding upon the courts, as it is not unreasonable nor against good morals or public policy. "Parties by their stipulations may in many ways make the law for any legal proceeding for which they are parties, which not only binds them, but which the courts are bound to enforce." (*Matter of Petition of New York, L. & W. R. R. Co.*, 98 N. Y. 447, 453.) The defendant admits that his principals are entitled to the benefit of the sum which he seeks to recover in this action, but he claims the right to apply it upon their indebtedness to him, rather than to permit it to be applied by the plaintiff upon their indebtedness to it. He denies that the plaintiff had any interest in the contracts made by him, but claims that he had such an interest in them as would have enabled him to enforce them in his own name, and to account for the profits by offsetting the amount thereof against the sum owing him by his insolvent principals. The claim of the plaintiff seems to be that Martin, Turner & Co. had so appropriated the shipment of hemp to the contracts for the sale of hemp as to operate as an equitable assignment of the profits or of the fund in controversy. The ultimate question, therefore, is what interest, if any, had the plaintiff in said contracts at the time the stipulation was made? The plaintiff practically owned the hemp, as was held in an action between these parties in relation to a cargo of sugar shipped and received at about the same time and under similar circumstances. (*Cooper v. Hong Kong and Shanghai Banking Corporation*, 107 N. Y. 282, 289.) But if not the unqualified owner, it was the pledgee, in actual possession, with absolute power to sell the hemp "at such times and in such manner" as it saw fit. It was its duty to apply the proceeds, less expenses, upon the five drafts and, it was its privilege to apply the remainder, if any, upon any other debt owing it by Martin, Dyce & Co. No interest in the contracts was ever assigned to it. There was no agreement in relation to them between plaintiff and the defendant

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or his principals. It neither acted nor contracted on the strength thereof. It did not even know of their existence until its rights were as complete as they ever became. It accepted the hemp without notice of any intended application or appropriation by Martin, Dyce & Co. Its title, therefore, was free from the effect of said contracts, and it had the right to sell when and to whom it chose, without reference thereto. It is true that Martin, Dyce & Co. intended, when they shipped the hemp, to use it to fulfill the contracts made by the defendant, their agent, but they did not notify the plaintiff of their intention, nor do anything to carry it into effect from which they could not recede at pleasure.

On January 22, 1884, they requested the plaintiff to deliver the bills of lading to him in exchange for his trust receipt. They did not, however, even then notify the plaintiff of said contracts, or of their intended use of the hemp, or of their object in making said request. It was a naked request which they could cancel or withdraw at discretion, and with which the plaintiff could comply or not as it saw fit. It could bind neither party unless acted upon to the detriment of the other. The bills of lading, with a copy of the letter containing said request, were received by the plaintiff's agent at New York on February third, but no action was taken by him until March fifth, when he wrote to the defendant asking if the hemp had been sold. He made no offer to comply with said request, but simply asked for information. The defendant at once replied, stating that "the hemp ex 'Polynesian' is sold at something like 4,000 pounds over its present value, the contracts being made in my name." Still no offer to comply with the request was made. March tenth defendant wrote the agent of the plaintiff rescinding his letter of the fifth instant, and stating that his relations with Martin, Dyce & Co., who had in the meantime failed, demanded that he should treat the sales of hemp made in his name as for his own account. March eleventh plaintiff's agent wrote defendant saying that he considered that the sales applied "to the 4,000 bales of hemp per Polynesian," but making no tender of the bills of

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lading nor any offer to comply with said request. When the hemp arrived on the eighteenth of March, plaintiff's agent asked defendant to take it and deliver it to his purchasers, but he declined, stating that he did not know the plaintiff in the matter. This is, substantially, all that was done by the plaintiff or its agent, or by the defendant or his principals, between the date of said request and March nineteenth, the date of the agreement which created the fund in question. It does not appear that the plaintiff relied upon the request in anyway, or that it did or omitted to do anything to change its position in consequence thereof.

We do not think that the plaintiff acquired any additional right by contract, estoppel or otherwise after it discounted the drafts and accepted a transfer of the bills of lading as collateral. Assuming that the contracts for the sale of hemp, although made in defendant's name, were the acts and property of his principals, still the plaintiff had no interest in them. It had entered into no contract, express or implied, with anyone in relation to them. The contracts could not be enforced either by or against it. If it refused to let its hemp be used to fulfill them, no one could lawfully complain, for they were not binding upon it, and it was under no obligation to anyone on account thereof. If the market-price of hemp had risen, the plaintiff could have sold when and where it chose in defiance of the defendant, his principals or purchasers.* No part of the loss could have fallen upon it. How can it claim the benefits of a contract by which it is not bound? What claim had it upon the defendant? What privity was there between them? What right has it to the profits since it was not bound to stand the losses? If it could not enforce the contract in its own name, without reference to the defendant, how could it enforce them through him? If it could not compel the purchasers to accept, how could it compel the defendant to deliver?

The parties do not ask us to decide whether the defendant had the absolute right, as against everyone, to substitute hemp purchased by him in the open market, but simply whether he had that right as against the plaintiff. As we have already

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seen, the plaintiff had no control over the contracts, so that the defendant could act independently and in disregard of its wishes deliver any hemp to his purchasers that would satisfy them. He did not agree with them to deliver the hemp on board of the Polynesian, or any specific hemp, but simply hemp shipped during October and November from Manilla. The contracts were not so connected with the hemp of the plaintiff as to become a part of it, at its election, because that particular hemp was not sold by the defendant, nor attempted so to be. If the contracts had been for hemp to arrive by the Polynesian, a different question would have been presented. The purchasers dealt exclusively with the defendant and knew no one else in the transaction. If he tendered them any hemp shipped during the time and from the place named in the contract, they were bound to receive it. The stipulation admits that he could have bought such hemp, and if he had done so the plaintiff could not have claimed the profits. As no right was created by the stipulation, except as to the remedy, which did not exist before, it cannot now claim the profits. We think that the defendant, as against the plaintiff, had the right of substitution as defined in the agreement between the parties, and that the plaintiff is not entitled to the fund in question. We do not pass upon the rights of the defendant as against his principals or their representatives. Their rights are not affected by this decision, as the judgment appealed from expressly declares that it "is without prejudice to any superior right of a creditor or assignee of Martin, Turner & Co. or Martin, Dyce & Company, if any such exist." We have examined the authorities cited upon either side, but while some of them throw light upon the subject none of them impress us as analogous.

As the agreement provided that the defendant should deduct his commissions, he had the right to do so. The learned referee found that the sum retained for this purpose was fairly earned. He reserved from the gross proceeds on this account no more than the plaintiff agreed that he might. What subsequently transpired between the defendant and his principals,

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or their assignees upon the subject, is of no concern to the plaintiff.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JAMES H. NEWALL, Respondent, *v.* EDWARD B. BARTLETT et al., Appellants.

The occupant or lessee of a dock or pier, to which vessels are allowed or invited to make fast for the purpose of discharging or receiving passengers or freight, is bound to keep and maintain the same in a reasonably safe condition and free from defects to those engaged or employed in carrying on such business.

114	399
118	931
114	399
139	498
114	399
142	445

In an action to recover damages for injuries received through the alleged negligence of defendants, it appeared that they were copartners in business as warehousemen, and as such occupied a pier. By their consent a steamer was made fast to their pier, landed its passengers and discharged cargo; that plaintiff in the performance of his duty as an employe of the owners of the steamer, was assisting in carrying baggage from the vessel on to the pier and within the inclosure where the baggage of the passengers was being deposited, when one of the doors to an opening in the enclosure of the pier fell over and struck him, inflicting the injuries complained of. The doors ran upon wheels overhead, which, at times, were thrown off the rail on which the wheels ran. Plaintiff gave evidence tending to show that defendants had notice of the dangerous character of these doors and that some of them had fallen before. *Held*, that whether the doors were properly constructed to secure safety and whether the principle on which they were constructed was reasonably safe, and if so, whether they were operated with reasonable guards to secure safety, and also whether the machinery had become out of order and unsafe, were questions of fact for the jury; also, that it was proper to show not only what was said to a deceased member of the defendants' firm, but what he said in relation to the falling of the door or any of them at any time before the accident, and while the doors and the manner of operating them remained the same.

In order to raise any question upon the ruling of the trial court, as to requests to charge, for review in this court the exception must be specific and point out the particular request to which it is intended to apply.

(Argued April 17, 1889; decided June 4, 1889.)

Statement of case.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 10, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

William W. Goodrich for appellants. The immediate proximate cause of the falling of the gate was the falling of a skid with force against the gate thus causing the gate to fall. The falling of the skid was caused by persons in the employ of the steamship, fellow servants of the plaintiff, and, therefore, for any injury resulting therefrom the plaintiff cannot recover in this action. (*Beach on Cont. Neg.* 32, § 10; *Cooley on Torts*, § 69; *Fairbanks v. Kerr*, 10 Am. Rep. 664.) Even if the gate was improperly constructed, the defendants are not liable for its falling, as the improper construction was not the immediate cause of the accident. (*King v. City of Troy*, 21 Week. Dig. 558.) All the cases which have held a defendant liable for remote causes of negligence have been cases where the defendant's act was voluntary or intentional. (*Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 215.) So far as the defendants are concerned, the plaintiff was a bare licensee and was subject to all the risks, there being no obligation on the part of the defendants to take due and reasonable care of him. (*Bachelor v. Fortescue* [Q. B. Div.], 49 L. T. Rep. [N. S.] 442; *Inderman v. Damus*, 14 id. 484; *Ivay v. Hodges*, 9 Q. B. Div. 80.) An owner of real property is not liable for injuries resulting from negligence on the part of a contractor or his employe engaged in performing a lawful contract for specific work on the premises. (*King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181.)

Nelson Smith for respondent. The proprietors of a pier are liable for damages arising from defects in it, or its appurtenances, to a person lawfully using the same in the course of business and who, in the exercise of due care, receives an

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injury from such defects. (*Swords v. Edgar*, 59 N. Y. 28; *Wendell v. Baxter*, 78 Mass. [12 Gray], 494, 496; *Barber v. Abendroth*, 102 N. Y. 406.) A person hired and acting as a laborer in the usual and accustomed business transacted upon a pier is there by right and for a lawful purpose, and has an action against the proprietor for an injury resulting from a neglect of duty to keep the pier and its appurtenances in a safe condition. (*Swords v. Edgar (supra)*; *Wendell v. Baxter (supra)*; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124.) Notice to one of several partners is notice to the firm as completely as if every member had been notified. (1 Green. on Ev. 172, 174.) It is competent to show notice to or knowledge by the master of any infirmity in his machinery. (*Delaney v. Hilton*, 18 J. & S. 345; *Chapman v. Erie Railway Co.*, 55 N. Y. 584.) The instructions of the master to his servant who is left in charge, as to the particular way he must transact the business, do not screen the master from liability to third persons for the negligent acts of the servant in disregard of the instructions. (*Garretzen v. Duenckel*, 50 Mo. 104.)

POTTER, J. The action was brought to recover damages for the injuries which the plaintiff alleged he had received to his person through the negligence of the defendants by the falling of a gate or door upon the pier or wharf in the possession and under the control of the defendants.

The first three sections of the complaint were admitted by the answer, and the facts thus admitted were substantially these: That from the first day of May, down to the time plaintiff was hurt, which was September 29, 1882, the above named defendants and John K. Bartlett, who died after the action was commenced, were copartners in business under the firm name of E. B. Bartlett & Co., and were warehousemen. They were in possession of the premises known as "Roberts' Stores," consisting of six stores, and the pier or wharf connected with them on the east side of East river, between Fulton and Wall streets in the city of Brooklyn. The pier or

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wharf was about sixty-five feet wide and extended into East river about three hundred and fifty feet. It was enclosed on the northerly and southerly side and westerly end and roofed, and had doors or gates about eleven feet high and ten feet wide, forming openings into or through the south side of the structure or building. That by the consent of the defendants' firm, including John K. Bartlett, deceased, as a partner, the steamship Valencia, upon her arrival from Venezuela on September 29, 1882, came and made fast to defendants' pier and landed passengers and discharged her cargo; that such landing was pursuant to an understanding between defendants' said firm and the owners of said steamship or of her cargo, or some part of it.

It was proved, in addition to the facts admitted, that the plaintiff, on the 29th of September, 1882, was employed by the master and owners of the steamship Valencia, and was on board of said ship when she arrived and made fast to this dock as aforesaid. It was made fast to the south side of this dock, and the plaintiff, in the performance of his duty as an employe on board of said ship, was assisting in carrying a small trunk of baggage from the vessel on to this pier and within the inclosure where the baggage of the passengers was being deposited; that he went through one of the open doorways with this trunk upon his shoulder, and when he had reached the inside of the structure through one of the doorways, and in setting down the trunk, one of the doors to these openings on the south side of the pier fell over and struck him on his back and side and, it is alleged, injured him very seriously. The plaintiff also made proof tending to show that defendant had notice of the dangerous character of these doors; that they had fallen, some of them, before, and one employe of defendant engaged upon the wharf said to John K. Bartlett, one of the partners, since deceased, that unless these fastenings were repaired somebody would get killed. The plaintiff gave proof tending to show the extent and character of his injuries, and the jury rendered a verdict in his favor for \$2,000 damages.

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The defendant gave evidence tending to show that these doors or gates were suspended by a cross-piece at the top of the opening, on which were laid a rod of iron as a rail, and upon which were wheels with curved rims made fast to the top of the door, and by this means the doors were closed or slid back and thus made openings in the side of the building. The defendant also gave evidence tending to show that the defendants' own men and employes did not open the doors upon this occasion, but that some were opened by the employes on the steamer or by the stevedore or some of his men in the employment of the steamer; that the door was thrown off the rod or rail on which it was moved or slid in opening or closing by means of a skid laid from the vessel into the building through one of these openings; that in doing so with the door partially open, the skid being slid down on its edge, when it was turned flat-ways, struck the edge of the door, which was not fully open, and thus knocked the door off from its fastenings and precipitated it upon the plaintiff, who was, as before stated, depositing baggage which he had brought from the vessel into the pier or building. There is some evidence tending to show that, previous to sliding down and placing of the skid, there had been, from the same gangway from which the skid was pushed out, a gang-plank from some other gangway from the vessel on to the pier, and plaintiff had proceeded down the gang-plank, one or the other, and had gone through these openings and was depositing the trunk when the skid was placed, and, according to the contention of the defendants, struck the door and dislocated or threw the door down and upon plaintiff.

It would thus seem that the plaintiff was inside of the building and depositing the trunk before the skid came in contact with the door and threw it off its fastenings. It is elementary law that the occupant or lessee of a dock or pier to which vessels are allowed or invited to make fast and to discharge or receive passengers or freight is bound to keep and maintain the same in a reasonably safe condition and free from defects dangerous to those engaged in or employed in

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carrying on such business. (*Leary v. Woodruff*, 4 Hun, 99; affirmed, 76 N. Y. 617; *Swords v. Edgar*, 59 id. 28; *Wendell v. Baxter*, 78 Mass. 494-496; *Barber v. Abendroth*, 102 N. Y. 406; *Coughtry v. Globe Woolen Co.*, 56 id. 124.) The plaintiff was in the employment of the vessel which had just made fast to defendants' pier, and was about to discharge her cargo and passengers with their baggage upon defendants' pier and with defendants' consent. The defendants were engaged in a *quasi* public employment, but, whether public or private, the defendants were bound to have their pier and its machinery to be used in the discharge of freight and passengers in a reasonably safe condition, so as to enable the plaintiff and all others legitimately engaged in the business to discharge their cargo and passengers. Whether the doors or gates were properly constructed to secure safety, whether the principle on which they were constructed was reasonably safe, or, if so, whether the principle was operated with reasonable guards to secure safety, or whether the machinery had got out of order and become unsafe, was a question of fact for the jury to determine. Various kinds of evidence were introduced, such as the carpenters who constructed the gates and rollers and other fixtures used in the operation of the gates, the practical operation of the same kind or similar apparatus in moving the gates upon other piers used in the same kind of business. There was evidence of the falling of these gates upon former occasions, and also evidence that this was the first that this gate or any gate upon this pier had fallen, and other evidence that the defendants were guilty of negligence. Such finding is conclusive in this case.

The plaintiff was called upon to show the defendants had knowledge that the doors or the machinery and fixtures were defective and unsafe. The method of showing that fact in this case was to show that John K. Bartlett, one of the partners, in carrying on this wharfage business (and one of the defendants in this action, but who died before its trial) knew of the gates falling by seeing the gate off its support and by being told of the fact by the witness Cavanaugh. I see no objection

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to such testimony. It was proper to show not only what was said to John K. Bartlett, or what he said to any person in relation to the falling of the gate or any of them at any time before the accident, and while the gates and the manner of operating them remained the same. (*Chapman v. Erie R. Co.*, 55 N. Y. 579.)

At the close of the evidence the defendants' counsel presented to the court eight requests to charge the jury. Without making any ruling upon these requests the court proceeded to deliver his charge. At its close the defendants' counsel requested the court to charge upon two additional requests, which the court charged. The counsel then excepted to one instruction embodied in the charge as delivered. The case then shows that "the court refuses to charge defendants' requests except as already charged, and defendants' counsel takes an exception to the refusal to charge as to each and every one of said requests." It does not appear which of the requests had been charged, and, consequently, we are not advised as to which of the requests the exceptions apply.

To raise any question upon the ruling of the trial court for review in this court the exception must be specific, and point out the particular request to which it is intended to apply. (*Smedis v. Brooklyn, etc., R. R. Co.*, 88 N. Y. 14.)

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JOHN W. DICKERSON, Appellant, *v.* MARY E. ROGERS,
Respondent.

In an action to recover for a quantity of meat alleged to have been sold between April, 1878, and April, 1880, to defendant, a married woman, the owner of a hotel, which it was alleged she carried on on her sole and separate account, it did not appear that she ever personally contracted with plaintiff for the meat, or in any manner induced him to deliver it or ever promised to pay for it; on the contrary, it appeared that plaintiff's negotiations were with defendant's husband, who did not pretend to be

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acting as agent, but held himself out to the public as the proprietor of the business. It was proved that defendant owned the property, which fact plaintiff knew; that she resided there with her husband and four children, and did such work about the hotel as is customary for the wife of a hotel proprietor, and that she did not lease the hotel to her husband; also, that the business cards of the house were signed by the husband as proprietor, and he assigned the guests their rooms, purchased all supplies, employed the servants, received the money due from guests and disbursed it as he saw fit. There was no evidence that defendant ever attempted to interfere with or control her husband's management of the hotel, or ever authorized him to act for her, or that she pretended at any time to be carrying on a separate business, or that any credit was ever obtained by her husband in her name or ostensibly on her account. *Held*, that plaintiff was not entitled to recover; that to maintain the action it was necessary for plaintiff to show that defendant was carrying on the business on her own account and for her own benefit, and that her husband acted simply as her agent.

It seems that, prior to the passage of the enabling act of 1884 (Chap. 380, Laws of 1884), a married woman could only contract in cases where authority was expressly conferred by statute. She could bind herself: *First*. Where the obligation was created in or about carrying on her trade or business. *Second*. Where the contract related to or was made for the benefit of her separate estate. *Third*. Where the intention to charge her separate estate was expressed in the instrument or contract by which the liability was created. *Fourth*. Where the debt was created for property purchased by her. The contract could be express or implied and made personally or by agent, and she could authorize her husband to act as such agent, and upon contracts thus made and debts thus created her separate estate would be chargeable.

(Argued April 18, 1889; decided June 4, 1889.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 9, 1886, which reversed a judgment in favor of plaintiff, entered upon the report of a referee and granted a new trial.

This action was brought against defendant, a married woman, to recover a balance claimed to be due for meat alleged to have been sold to her.

The facts are sufficiently stated in the opinion.

E. Countryman for appellant. If the defendant was carrying on the business at the hotel or boarding-house "on her sole and separate account," she was liable for the meat furnished

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by the plaintiff. (Laws of 1860, chap. 90, §§ 2, 3.) If there was no conventional relation between the defendant and his wife, which would give him the right to hold possession, then his mere marital relations would not be sufficient to make him the actual occupant. (*Porter v. McGrath*, 9 J. & S. 85, 101; *Rowe v. Smith*, 45 N. Y. 230, 232; *Gage v. Dauchy*, 34 id. 293.) The wife is liable for the acts of her husband as agent in her business as well of any other person authorized to represent her. (*Noel v. Kinney*, 106 N. Y. 74, 78; *Abbey v. Deyo*, 44 id. 343, 344; *Knapp v. Smith*, 27 id. 277; *Buckley v. Wells*, 33 id. 518; *Smith v. Kennedy*, 13 Hun, 9; *Bodine v. Keller*, 53 N. Y. 93.)

Richard L. Sweezy for respondent. A married woman cannot (or could not, prior to the act of 1884, passed subsequent to the commencement of this action) bind herself by contract, unless, first, the obligation was created by her in or about carrying on her separate trade or business; or, second, the contract was made by her for the benefit of her separate estate; or, third, the intention to charge the separate estate is expressed in the contract by which the liability is created; or, fourth, the debt is created for property purchased by her. (*Bertles v. Nunan*, 92 N. Y. 152; *Saratoga County Bk. v. Pruin*, 90 id. 250; *Linderman v. Farquharson*, 101 id. 434; *Coleman v. Burr*, 93 id. 17.) Plaintiff swears to no dealings or conversations with defendant personally which can be construed, as against a married woman, as evidence of an intention to charge her separate estate. A ratification, to be effectual, must be of an act performed ostensibly on behalf of the principal. (*Travis v. Scriba*, 12 Hun, 391.) It is not sufficient to show that defendant incidentally received some benefit from the business. (*Sanford v. Pollock*, 105 N. Y. 450.) In order to recover plaintiff must prove that he was a mere agent, and was acting on her behalf and by her authority. (*Travis v. Scriba*, 12 Hun, 391; *Jones v. Walker*, 63 N. Y. 612; *Nash v. Mitchell*, 71 id. 199; *Sanford v. Pollock*, 105 id. 450.) A husband and wife cannot enter into a partnership

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with each other. (*Fairlee v. Bloomingdale*, 14 Abb. N. C. 341; *Noel v. Kinney*, 15 id. 403.)

PARKER, J. The referee before whom the case under consideration was tried, found, in substance, as matters of fact, that the defendant was a married woman; that between April, 1878, and April, 1880, she was the owner of a valuable hotel property, which she carried on on her sole and separate account, and that between those dates the plaintiff sold and delivered to her a large quantity of meat, on account of which there remained unpaid the sum of \$1,486.87, besides interest. The referee thereupon directed judgment in favor of the plaintiff for such balance and interest.

The judgment entered upon such report was reversed by the General Term, and the plaintiff appealed to this court, stipulating in his notice of appeal that if the order appealed from be affirmed, judgment absolute shall be rendered against him.

As it appears in the body of the order appealed from that the reversal was had both upon question of fact and law the determination of the General Term must be reviewed upon the questions of fact as well as the questions of law. At common law a married woman did not have the authority to make contracts. Many of her disabilities in that regard have been removed from time to time by statutory enactment. Still, prior to the passage of the enabling act of 1884 (Chap 381, Laws 1884), which was subsequent to the commencement of this action, the wife's ability to make contracts was limited so she could only contract in cases where authority had been expressly conferred by statute. She could bind herself by contract, where, *first*, the obligation was created by her in or about carrying on her trade or business; or, *second*, the contract related to or was made for the benefit of her separate estate; or, *third*, intention to charge her separate estate was expressed in the instrument or contract by which the liability was created; or, *fourth*, the debt was created for property purchased by her. (*Saratoga County Bank v. Pruyn*, 90 N. Y. 250.) Within such limits she was permitted to contract as if she were a *feme*

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sole. The contract could be express or implied and made personally or by agent. She could authorize her husband, as well as any other person, to act as such agent. Upon contracts thus made, and for debts thus created, her separate estate is chargeable by law.

The question, therefore, is whether the evidence before us establishes a liability on the part of the defendant to the plaintiff within the limits of responsibility on the part of a married woman.

The defendant did not personally contract with the plaintiff for the meat for the value of which he seeks to charge her in this action. It is not pretended that she ever promised to pay the plaintiff therefor, either orally or in writing. She did not in any manner attempt to induce the plaintiff to furnish meat. On the contrary, it appears from the plaintiff's testimony that he went to defendant's husband and solicited his custom. Upon that subject he testified as follows: "I had a conversation with Mr. Rogers at the house; I told him I would like to sell him some meat; he said he was buying of the butcher there, and to come in again, so I came in the next day or two; I sold him some meat and that was the first charge put on the book; * * * the Amityville butcher supplied him mostly at that time; that was in the spring; in about a month or six weeks I began to supply him with most of his meats; * * * I dont recollect any particular conversation further; he would say what meat he wanted and I would deliver it; I pursued the same course of business the following year of 1879; * * * I received payment from Mr. Rogers from time to time as stated on the bill."

It was with Mr. Rogers, therefore, that the negotiations were had, and from him the payments on account were received. Plaintiff knew that defendant owned the hotel building and premises, and with that knowledge he dealt with Mr. Rogers, who did not pretend to be acting as agent, but, on the contrary, held himself out to the public as the proprietor of the business.

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The plaintiff having contracted with Mr. Rogers as principal, could only recover in this action by showing that Rogers was actually an agent for an undisclosed principal, to wit, this defendant; that she was, in fact, engaged in carrying on the hotel business on her own account and for her own benefit.

Upon the plaintiff rested the burden of affirmatively establishing such fact. This, we think, he failed to do. It was proven that she owned the property; resided there with her husband and four children; did such work about the hotel as is customary for the wife of a hotel proprietor, and that she did not lease the hotel to her husband. On the other hand, it appears that the husband held himself out to the public as the proprietor in various ways. The business cards of the house were signed "J. M. Rogers, Prop." He assigned the guests their rooms, purchased all supplies, employed the servants, received the money due from guests and disbursed it as he saw fit.

There is no evidence that the defendant ever attempted to interfere with or control her husband's management of the hotel; that she ever authorized him to act for her, or that she pretended, at any time, to be carrying on a separate business, or that any credit was ever obtained by her husband in her name, or ostensibly on her account.

A careful consideration of the evidence, to which we have but briefly alluded, seems to us to lead irresistibly to the conclusion that this defendant did not undertake to carry on a separate business, but, on the contrary, gave to her husband, as she lawfully might, the use of her property and her service in the conduct of a business in his own name.

The order appealed from should be affirmed, and the defendant have judgment absolute dismissing the complaint.

All concur.

Order affirmed and judgment accordingly.

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CHARLES B. GUMB, Respondent, *v.* THE TWENTY-THIRD STREET RAILWAY COMPANY, Appellant.

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118 308

In an action to recover damages for personal injuries to plaintiff, and also for injuries to his wagon, the complaint alleged that he was "put to expense in repairing the same and endeavoring to be healed of his own hurts, and prevented from going on with his business." There was no allegation that he expended money in hiring others to work in his place. Plaintiff was permitted to testify, under objection, that the evidence was not within the issue; that while suffering from his injury he employed two men to work in his place and paid them \$135. *Held*, error.

Where a plaintiff alleges in his complaint that his person has been injured by the negligence of defendant, and proves the negligence and injury, the law implies damages, and he may recover such as necessarily and immediately flow from the injury, under a general allegation that damages were sustained; but if he seeks to recover damages for consequences which do not necessarily and immediately flow from the injury, he must allege the special damages he seeks to recover.

Plaintiff was permitted to testify, under objection and exception, as to the amount paid for repairs to his property, without showing that the repairs were proper or worth the sum paid. *Held*, error.

Plaintiff was permitted to show how much his physician charged without giving evidence of payment, or any evidence of the value of the services. *Held*, error.

Gumb v. T. T. S. R. Co. (21 J. & S. 466) reversed.

(Argued April 19, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made July 2, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

Leslie W. Russell and *Welton Percy* for appellant. The court erred in refusing to charge that it was the plaintiff's duty to take care not to impede or interfere with the car, and, inasmuch as the defendant's cars are for public use, their right to run upon the street at the particular time and place they are

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about to pass is paramount to that of ordinary vehicles. (*Hegan v. E. R. R. Co.*, 15 N. Y. 380, 382; *Craig v. Rock R. R. Co.*, 39 id. 404, 410; *Whittaker v. Eighth Ave. R. R. Co.*, 51 id. 295, 299; *Adolph v. C. P. R. R. Co.*, 76 id. 530, 535, 536; *Barker v. H. R. R. R. Co.*, 4 Daly, 274, 276; *Fleckenstein v. D. D. R. R. Co.*, 105 N. Y. 655; *Donnelly v. B. C. R. R. Co.*, 109 id. 16, 21.) Where loss of time is claimed as an item of damages for personal injury occasioned by negligence, if plaintiff fails to prove the value of the time lost, or facts on which an estimate of such value can be founded, damages for the item cannot be given. (*Leeds v. M. G. L. Co.*, 90 N. Y. 26.)

Charles M. Hough for respondent. If plaintiff's answers to the questions as to the men he hired to work in his place were proper, though the questions were not, the defendant was not harmed. (*Wright v. Cabot*, 89 N. Y. 570; *Mayor, etc., v. S. A. R. R. Co.*, 102 id. 572.) The bill which the doctor had presented for payment to the plaintiff was presumptive proof of the amount he would be obliged to pay. (*Gries v. Zeck*, 24 Ohio St. 329.) The testimony that the defendant required its driver to act both as conductor and driver, to the admission of which no exception was taken, and that the defendant had that day kept him at work for seventeen hours out of the twenty-four, was properly admitted. (*Lewis v. N. Y. S. C. Co.*, 143 Mass. 267, 273.) An instruction having been given, or testimony admitted without exception, to the mere repetition of the instruction or of the testimony, no exception will lie. (*Raymond v. Richmond*, 88 N. Y. 671; *White v. Old Dom. S. S. Co.*, 102 id. 660.) If any one of the propositions in a request to charge is erroneous, it is proper to refuse it altogether. (*Palmer v. Holland*, 51 N. Y. 416; *Hamilton v. Eno*, 81 id. 116, 127; *Doughty v. Hope*, 3 Denio, 594.) If the charge of the judge that other people were bound to keep the track clear as far as they could was correct, the court was right in refusing, as he did, to charge further on the point, except as already charged. (*Raymond v. Rich-*

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mond, 88 N. Y. 671; *Fleckenstein v. D. D. R. R. Co.*, 8 N. Y. State Rep. 32; 105 N. Y. 655; *Adolph v. C. P., etc., R. R. Co.*, 1 J. & S. 186; 11 id. 199; 65 N. Y. 554; 76 id. 530.) The defendant's request to charge concerning the defendant's paramount right to the use of the street was inapplicable to the facts as proven in the case at bar, and was properly refused. (*O., etc., R. R. Co. v. Ward*, 47 N. J. Law, 560; *Lee v. T., etc., G. L. Co.*, 98 N. Y. 115; *Doughty v. Hope*, 3 Denio, 594; *People v. McCallum*, 103 N. Y. 587, 597; *Caldwell v. N. J. Steamboat Co.*, 47 id. 282.)

FOLLETT, Ch. J. At the intersection of Sixth avenue and Twenty-third street the tracks of the defendant and of the Sixth Avenue Railroad cross each other nearly at right angles. On February 12, 1883, a Sixth avenue car was moving north on the east track of that line, closely followed (from Carmine street to Twenty-third street) by a butcher's wagon, with its wheels on the rails, drawn by one horse, driven by the plaintiff, who owned horse and wagon. This car stopped to receive and discharge passengers at the north crosswalk of Twenty-third street. The plaintiff stopped his horse immediately behind the car. As this occurred one of defendant's cars approached from the west on the north track of its line, collided with the hind wheels of plaintiff's wagon, overturned, broke it, and, as it is asserted, injured the plaintiff's left leg. The plaintiff testified that the head of his horse was close to the rear end of the Sixth avenue car, with the hind wheels of his wagon standing midway between the rails of the north track of defendant's line, and that defendant's car was driven against the hind end of his wagon. Foley, plaintiff's witness, testified that the rims of the hind wheels stood over the north rail of the north track. Edwards, defendant's driver, testified that the hind wheels stood far enough north of the north rail to have permitted the car to pass without touching; but that as the car was passing the plaintiff's wagon was backed in the way of the car. This and the rate of speed of the defendant's car were the principal facts in dispute. The plaintiff testified

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that he saw the defendant's car approaching rapidly; but he did not explain why he made no attempt to turn to the right or left of the Sixth avenue car, and leave the track. There is no evidence that anything prevented him from doing this.

The plaintiff was permitted to testify, over defendant's objection, that the evidence was not within the issue; that while suffering from his injury he employed two men to work in his place, paying them \$12 and \$15 per week each, \$135 in the aggregate. When a plaintiff alleges that his person has been injured and proves the allegation, the law implies damages, and he may recover such as necessarily and immediately flow from the injury (which are called general damages) under a general allegation that damages were sustained; but if he seeks to recover damages for consequences which do not necessarily and immediately flow from the injury (which are called special damages), he must allege the special damages which he seeks to recover. It is not alleged in the complaint that the plaintiff expended money in hiring others to work in his place; the defendant had no opportunity of contradicting the evidence, and its reception was error. (*Gilligan v. N. Y. & Harlem R. R. Co.*, 1 E. D. Smith, 453; *Stevens v. Rodger*, 25 Hun, 54; *Whitney v. Hitchcock*, 4 Denio, 461; 2 Thompson on Negligence, 1250, §§ 32, 33; 2 Sedg. on Dam. [7th ed.] 606; 1 Chitty's Pl. [16th Am. ed.] 411, 515; *Mayne on Damages*, chap. 17; *Heard's Civil Pl.* 310-314.)

The plaintiff was permitted to testify that he had paid seventy dollars for the reparation of his wagon. The defendant objected to this evidence upon the ground that it did not establish the extent of the injury or the value of the repairs. The objection was overruled and the defendant excepted. In the absence of evidence that the repairs were proper, or worth the sum paid, it was error to hold that the sum paid could be recovered. This error was repeated. The plaintiff, under a like objection, was permitted to show how much this physician charged him, without giving evidence of payment or any evidence of the value of the services, except the incidental remark

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of the physician, who testified, "Seventy-five dollars is the amount of my bill now; that is very small, too."

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except BRADLEY, J., dissenting.

Judgment reversed.

JAMES H. RUGGLES, Respondent, v. THE AMERICAN CENTRAL INSURANCE COMPANY OF ST. LOUIS, Appellant.

Written application for fire insurance was made by a broker on behalf of plaintiff to defendant's agents. The agents orally agreed to insure from the date of the application provided the company was not already "on the risk." The premium was not paid, but in an action upon the alleged contract of insurance it appeared that it was the custom to extend credit to the broker for the premium to the end of the month. *Held*, that there was a complete and valid contract binding from the date of the conversation.

The authority of the agents was contained in two letters, one from defendant's general agent, the other from its secretary, both mailed before the making of the contract, but not received by the agents until after the fire. *Held*, the authority dated from the mailing of the letters.

The letter from the general agent contained this statement: "Please do not undertake to write any specials for us at present." The secretary's letter stated that "a commission of authority, as agents of this company in the city of Brooklyn," had been forwarded to the agents, adding, "We deem it unnecessary to enter into any detailed instructions as to the conduct of our business at your agency," giving as a reason that the general agent had written on the subject. The risk in question was a special one. *Held*, that the authority given by defendant was that of general agents, and did not exclude the taking of special risks; that the reference to "detailed instructions" did not limit the agent's power; that it referred to the manner of conducting the business, not to the authority to be exercised by the agent.

A general agent may bind his principal by an act within the scope of his authority, although it may be contrary to his special instructions.

(Argued April 22, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 23, 1886, which affirmed a judgment in favor of

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plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought on a contract of fire insurance upon a building in the city of Brooklyn owned by plaintiff, alleged to have been made by one Barker, on behalf of plaintiff, with Sedgwick & Hammond, defendant's agents.

The facts, so far as material, are stated in the opinion.

J. Stewart Ross for appellant. It is the business of the party dealing with a limited agent to examine his authority; and, therefore, if there be any qualification or express restriction annexed to the commission, it must be observed; otherwise the principal is discharged. (Dunlap's Paley's Agency, 202, note *a*.) Whenever the authority purports to be derived from a written instrument, the other party is bound to take notice that there is a written instrument of procurement, and he ought to call for and examine the instrument itself to see whether it justifies the act of the agent. (Story on Agency, §§ 68, 69, 72, 76, 83; 2 Kent's Com. 618-621; 3 id. 261; Parsons on Cont. 40.) One man can be bound only by the authorized acts of another. (1 Parsons on Cont. 45.) All written powers, such as letters of attorney or letters of instruction, receive a strict interpretation. (Dunlap's Paley's Agency, 192, 195; Story on Agency, §§ 68, 69; *North River Bank v. Aymar*, 3 Hill, 262.) Where the agency is created and conferred by a written instrument, the nature and extent of the authority must be ascertained from the instrument itself, and cannot be enlarged by parol evidence of the usage of other agents in like cases, or of an intention to confer additional powers. (Story on Agency, § 76.) There was an absolute prohibition against Sedgwick and Hammond writing any "special risk." (*Brown v. McGram*, 14 Pet. 480; *Marfield v. Douglass*, 1 Sandf. 360; *Wilson v. Wilson*, 26 Penn. 393.)

A. C. Aubery for respondent. The principal is bound by the act of his agent in excess or abuse of his actual authority, when a third person, who, believing and having a right to believe that the agent was acting within and not exceeding his

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authority, would sustain loss if the act was not considered that of the principal. (*Walsh v. H. F. Ins. Co.*, 73 N. Y. 5, 9, 10; *Bickford v. Menier*, 107 id. 490; *Banks v. Everest*, 12 Pacific Rep. 141.) Such a construction will be put upon an instrument as will be most favorable to those whose rights are affected thereby, and who had no part in its preparations, so as to uphold, rather than to defeat, the rights which are dependent upon it. (*Reynolds v. C. F. Ins. Co.*, 47 N. Y. 604.) There is a marked distinction between authority to act and instructions uncommunicated, and not intended to be communicated to third parties dealing with the agent. Private instructions can, with no propriety, be deemed limitations on an agent's authority. (Parsons on Cont. 41; *Hatch v. Taylor*, 10 N. H. 538, 543.) Special instructions to the agent cannot defeat an action on a contract generally within the scope of his authority. (*Sanford v. Handy*, 23 Wend. 260, 266; *Ellis v. Albany Ins. Co.*, 4 Lans. 433; 50 N. Y. 402; Story on Agency, §§ 73, 133, and notes; Paley on Agency, 200, 201, and notes; *Munn v. Commission Co.*, 15 Johns. 44; *Angell v. H. F. Ins. Co.*, 59 N. Y. 171, 174; Wood on Ins. § 529 [2d ed.].) The rule that private instructions do not bind a party dealing with an agent, unless he has notice of them, applies to contracts of insurance as well as to other contracts. (*H. F. Ins. Co. v. Farrish*, 73 Ill. 166; *E. L. Ins. Co. v. Brobst*, 18 Neb. 528; *L. F. Ins. Co. v. Woodworth*, 83 Pa. St. 223; *S. L. Ins. Co. v. McCain*, 96 U. S. 84; *C. U. Ass. Co. v. State*, 13 West. Rep. 48.) An agent with general authority may insure property situated outside of the particular locality for which he was appointed, unless the assured knew of the limitations upon his jurisdiction, or the circumstances were such that he ought to have known. (*Lightbody v. N. A. Ins. Co.*, 23 Wend. 18; *Aetna Ins. Co. v. Maguire*, 51 Ill. 342.)

BROWN, J. The court properly submitted to the consideration of the jury the question whether there was a binding

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agreement for insurance, between the plaintiff's broker and the firm of Sedgwick & Hammond.

The testimony of the witness Barker was positive that the agreement was full and complete. Written application for the insurance, specific in all its details, had been filed with Sedgwick & Hammond, and the premium upon the risk was agreed upon, and there was evidence that the usage of the business was to extend a credit to the broker for the premium until the end of the month. As to the oral agreement, the evidence of this witness was that, after Hammond had shown to him the letter from the company appointing his firm agents, and had stated that he "would bind the risk provided the company was not on," he said to Hammond: "It is understood that the policy is binding provided the company is not on the risk," and Hammond replied, "Yes." Asked: "When it was binding from," he answered, "From the sixteenth; from that time; from that conversation."

If this evidence was to be credited, it justified the inference of a complete binding agreement from the date of the conversation. It was for the jury to draw the inference, and such a contract, if made, was a valid agreement for insurance upon which a recovery could be had. (*Ellis v. Albany Ins. Co.*, 50 N. Y. 402.) A more serious question is presented as to whether the agreement thus made was binding upon the company.

At the close of the testimony the counsel for the defendant asked the court to dismiss the complaint upon the ground that it appeared that the letter appointing Sedgwick & Hammond agents for the defendant limited them against insuring special risks, and risks within what was called "the shore line," which motion was denied, and to such denial defendant excepted.

The court was also asked to charge the jury that the plaintiff's premises were within the shore line; and, also, if the jury should find that the risk was a special risk, that the agents had no authority to bind the defendant, and it was not liable.

Both requests were refused and defendant excepted to each

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refusal. The location of the "shore line" was a disputed fact on the evidence. By the map, called "Higginson's map," the plaintiff's property was within the line. According to the location of the line by other witnesses it was not. The determination of this fact, if it was a material one, was properly left to the jury. No question can arise on this appeal upon that branch of the case. The request to charge that if the jury should determine that the risk was special, the defendant was not liable, raised no other or different question than that presented by the motion to dismiss the complaint, as the risk was conceded to have been a special one, and the jury would have been bound so to find. The request was, therefore, equivalent to asking for a direction of a verdict for defendant. The point of the appellant's contention was that the court should have decided upon the letter, which contained the agent's delegation of authority, that they possessed no power to bind the defendant upon a special risk, and this question is the most serious one presented upon this appeal. It may be conceded that the commission of authority had not, at the time of making the agreement, reached the agents. It had, however, been mailed from St. Louis, as the letter of the secretary of the company, dated October thirteenth, refers to it as having been forwarded by mail on that day. It may also be conceded that it did not reach the agents until October twentieth, the day after the fire, as Hammond in his letter to the plaintiff, under date of October twenty-first, speaks of the agents not having power to bind the company "until yesterday;" and Sedgwick testified that the two letters introduced in evidence were the only communications they had received from the company with reference to their acting as agents prior to the fire, which occurred on October nineteenth. The evidence upon the question of power is, therefore, to be found entirely in the two letters last mentioned. The first of these letters bears date October eleventh, and was written to Sedgwick & Hammond by Mr. Van Valkenburgh, a general agent of the company. In it he says: "If your appointment is confirmed, your jurisdiction will be the city of Brooklyn, outside the

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shore line, but we shall expect you to write no large risks for us until you know for certain that we are not in through our New York office. As we are now on all Brooklyn specials of any size that we will write, please do not undertake to write any specials for us at present." The second letter was written by the secretary of the company from St. Louis, dated October thirteenth, and addressed to Sedgwick & Hammond. It states: "We take very great pleasure in forwarding to your address by mail to-day a commission of authority as agents of this company in the city of Brooklyn.

"We deem it unnecessary to enter into any detailed instructions as to the conduct of our business at your agency, as our Mr. Van Valkenburgh has written you upon that subject," etc. Whatever authority the agents had, they derived from these letters. The risk was a special one, and so admitted by the plaintiff upon the trial.

Was authority to insure such a risk withheld from the agents? We do not so interpret the letters. It is true that Van Valkenburgh wrote that the agents should not write any large risks until they knew that the company was not on through their New York office, and should not undertake to write any specials for the company, but this limited authority is not confirmed in the letter from the company. In that letter the authority is broadly stated to be "Agents of the company in the city of Brooklyn." There was no exception in the territory named, nor limitation as to the character of the risks to be insured. The other expression in the latter that "we deem it unnecessary to enter into any detailed instructions as to the conduct of our business at your agency, as our Mr. Van Valkenburgh has written you upon that subject," does not in any way limit the agents' power. Its plain reference is to the manner of conducting the business, and not to the authority to be exercised by the agent. That this view is the one entertained by the agent is plain from Hammond's letter to the plaintiff, under date of October twenty-first, in which he places his denial of the existence of an agreement to insure on the fact that they had not at the date of the alleged agreement received their

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commission of authority, and not at all upon the ground that such a contract was in excess of their power.

We think, therefore, that the letter of October thirteenth, fairly interpreted, constituted Sedgwick & Hammond general agents of the company; and that the utmost that could be claimed from the direction contained in Van Valkenburgh's letter, which I have quoted, was that they were instructions for the guidance of the agent, which would in no way affect contracts with third parties having no notice or knowledge of such instructions.

A general agent may bind his principals by an act within the scope of his authority, although it may be contrary to his special instructions. (*Story's Agency*, § 733; *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; *Lightbody v. North Am. Ins. Co.*, 23 Wend. 18; *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171.) In *Walsh v. Hartford Fire Insurance Company* the rule is stated as follows: "A restriction upon the power of an agent not known to persons dealing with him, limiting the usual powers possessed by agents of the same character, would not exempt the principal from responsibility for his acts and contracts which were within the ordinary scope of the business intrusted to him, although he acted in violation of special instruction." *Lightbody v. North American Insurance Company* was a case very similar to the case under consideration. The plaintiff owned property in Utica, upon which he procured insurance in the defendant company by parol agreement with an agent in Troy, whose authority was limited to "Troy and vicinity," and who was denied the power to insure special risks. The plaintiff's property was a special risk. The Supreme Court held the agreement to be binding on the defendant. BRONSON, J., saying: "Although he" (the agent) "must answer to his principals for departing from their private instructions, he clearly bound them so far as third persons dealing with him in good faith are concerned."

The manner of conducting the business of insurance is so well known that a person may reasonably assume that one having the apparent power of a general agent is not limited

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by his instructions as to the class of risks he may insure. Corporations organized under the laws of other states, and having their general officers in those states, do business in this state through agents who are intrusted with policies signed by the officers of the company, and which become binding contracts upon the indorsement of the agent. Such agents have power to make original contracts of insurance, and this mode of conducting the business is so well established that it has become a part of the common knowledge of the community, and judicial notice must be taken of it. (*Ellis v. Albany F. Ins. Co.*, 50 N. Y. 406, 407.) Persons dealing with such agents in good faith have the right to assume that they possess the power usually exercised by that class of officers, and, unless the limitation on their authority is brought to their knowledge, the contracts made with them will be binding upon the company. (*Walsh v. Hartford Ins. Co., supra.*)

There was nothing in the transaction between Barker and Hammond, as shown by the evidence, from which the court could assume that Barker had any notice of any limitation on the agents' power. At the time of making the agreement, Hammond showed him a letter from the company, and it having been proven by Sedgwick that prior to the fire but one letter from the company was received, it must be assumed that the letter shown was that of October thirteenth. As I have already shown, this letter constituted Sedgwick & Hammond the general agents for the city of Brooklyn, and no one in reading it could have supposed that, by the reference to the Van Valkenburgh letter, the company intended to place any limitation upon the agents' power but that the direction contained therein related to the manner of conducting the company's business at the agency. We think the contract made with Hammond was, therefore, binding upon the company.

There being no other question in the case requiring discussion, the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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HARRIET S. RUMSEY et al., Appellants, v. THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY, Respondent.

The provision of the Revised Statutes (1 R. S. 208, § 67), prohibiting the commissioners of the land office from making grants of land under the waters of navigable streams "to any person other than the proprietor of the adjacent lands," has reference to proprietors of the adjacent uplands.

A railroad company that has acquired title to land under water some distance from the shore for the purpose of constructing its road-bed, and has built thereon an embankment supporting its tracks, leaving a bay between the embankment and the original shore line into which the tide ebbs and flows, is not a "proprietor of adjacent lands" within the meaning of said provision, and the owner of the upland adjoining the original shore, not the railroad corporation, is entitled to the grant.

It seems the provision of the General Railroad Act of 1850 (§§ 25-49, chap. 140, Laws of 1850), empowering said commissioners to make grants of state lands to railroad corporations, includes a power to grant to such a corporation lands under water for the erection of docks necessary to the transaction of its business.

It was the intent of the legislature, in the passage of the act of 1846 creating the H. R. R. R. Co., and authorizing the construction of its road along the east shore of the Hudson river (Chap. 216, Laws of 1846), to protect the upland owners along said shore in their access to the waters of the river, and to maintain their rights in the river unimpaired by the construction of the railroad (§§ 15, 16), and it did not change the policy of the state with reference to the promotion of commerce on the river, or deprive the said commissioners of the power to make grants of land under water to the owner of the uplands.

Plaintiffs are the owners of certain uplands bordering upon the easterly shore of the Hudson river. In 1848 their predecessors in title deeded to the H. R. R. R. Co. a strip of land, partly above high-water mark and partly under the water of the river, retaining, however, a large part of the original shore line. Upon said strip the railroad company constructed an embankment several feet above high-water mark for their road-bed, which embankment is between plaintiffs' uplands and the channel of the river, but a considerable distance outside of the original shore line. A culvert or opening was built in the embankment, through which the waters flowed into the bay, between it and the said shore line. In 1868 said company obtained from the commissioners of the land office a grant of the land under water covered by its road-way, and extending westward into the river 200 feet. In 1885 said commissioners executed to plaintiffs a grant of land under water extending along the whole water front of their uplands, and westward into the river a considerable distance beyond the said company's road, the grant expressly excepting and reserving the

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rights of said company. In 1881 defendant built a portion of its road in the waters of the river, in front of plaintiffs' uplands, west of the H. R. R. R. Co.'s road; partly on the land so granted to said company and partly outside, but within the lines of plaintiffs' grant. *Held*, that the grant to the plaintiffs was valid, and that an action was maintainable to restrain defendant from operating its road over and upon the lands so granted. *Gould v. H. R. R. R. Co.* (6 N. Y. 522); *Langdon v. The Mayor, etc.* (93 id. 29), distinguished.

(Argued April 23, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 10, 1886, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial without a jury.

The nature of the action and the material facts are stated in the opinion.

M. A. Fowler for appellants. The title acquired by the Hudson River Railroad Company to lands under water is a limited fee. (Laws of 1846, p. 275.) The railroad company became the owner of the lands under water only so far as they were actually necessary to build upon, and the riparian owners retained the rest, with the additional burden put upon the railroad company of giving to the riparian owners the full and usual access to the river. (*Langdon v. Mayor, etc.*, 93 N. Y. 129-145.) The Hudson River Railroad did not by its charter become the owner of the land, either above or under water, so as to make it proprietor of the adjacent upland within the meaning of the law giving to the commissioners of the land office power to grant lands under water to them. (Laws of 1852, p. 621.) The grant to the Hudson River Railroad Company in 1873 was not made valid by an act of the legislature of 1881. (Laws of 1881, chap. 625.) The plaintiffs are the adjacent owners of the upland, and, therefore, the grant made by the commissioners of the land office to them is legal. (Laws of 1850, p. 621.)

Walter C. Anthony for respondent. Any grant made under the general act by the land commissioners, except to owners

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of "the adjacent land," is void. (Laws of 1850, chap. 283, § 1.) They have power, however, to grant lands under the waters of the Hudson to any railroad company. (Laws of 1850, chap. 140, § 25.) Their grant to the Hudson River Railroad Company was, therefore, valid, and it was ratified in 1881. (Laws of 1881, chap. 625.) Under the warranty deed from plaintiffs' ancestor, together with its charter and the land commissioners' grant, the Hudson River Railroad Company had become the owner in fee of the strip of land which it occupied. (*Lansing v. Smith*, 4 Wend. 1; *Langdon v. Mayor, etc.*, 93 N. Y. 129.) The interest conveyed by the commissioners' grant to the Hudson River Railroad Company amounted to a title, and the land under water could be conveyed separately by said company. (Gerard on Titles, 719, 720; *Heath v. Barnmore*, 50 N. Y. 302; *Yates v. Bogert*, 56 id. 526; *Kenny v. Wallace*, 24 Hun, 478.) Under James Rumsey's warranty deed to the Hudson River Railroad Company any interest he might have acquired in the lands conveyed by said deed would have inured to the benefit of his grantee, by way of estoppel, so that he and his devisees could not take title to said land by the water grant to the detriment of said railroad company. (*Bank of Utica v. Mesereau*, 3 Barb. Ch. 528; *Jackson v. Bull*, 1 Johns. Cas. 81; *Jackson v. Murray*, 12 Johns. 201.)

BROWN, J. This action was brought to restrain the defendant from operating its road over and upon certain lands lying below high-water mark in the Hudson river, to which the plaintiffs claim title through letters-patent issued to them by the commissioners of the land office of the state.

It appears, from the findings of the trial court, that the plaintiffs own certain uplands situated in the village of Fishkill Landing, in Dutchess county, which border upon the easterly shore of the Hudson river, and that in the year 1881 the defendant built a portion of its railroad in the waters of the river, in front of the above-mentioned uplands and between said lands and the channel of the river, and continued to use

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and operate its railroad upon said land up to the commencement of this action ; that on March 3, 1885, the commissioners of the land office granted and conveyed to the plaintiffs a certain lot of land under the waters of the river, extending north and south along the whole water front of plaintiffs' uplands, and westward into the river, for a considerable distance beyond the line of the defendant's road ; that in or about the year 1848 James Rumsey and Harriet Gill, the plaintiffs' ancestors, through whom they derived their title to the uplands aforesaid, executed and delivered a warranty deed to the Hudson River Railroad Company for a strip cf land, consisting, in part, of land above high-water mark and partly of land under the water of the river, retaining, however, a large part of the original shore line. Upon the strip of land described in said deed the said railroad company constructed a solid embankment, several feet above high-water mark of said river, for their line of railway, which embankment has ever since stood and still stands directly between plaintiffs' uplands and the channel of the river, but a considerable distance outside of the original shore line. A culvert or opening was built in said embankment, through which the waters of the river flow into the bay between the said embankment and the originel shore line, and the tide rises and falls upon plaintiffs' upland aforesaid.

After the construction of its said road, and in or about the year 1868, the Hudson River Railroad Company obtained from the commissioners of the land office a grant of the land under water covered by its said roadway, and extending westward into the river two hundred feet from the center line of its said road. The line of defendant's road is partly within the lands granted to the Hudson River Railroad Company as aforesaid, and partly without said company's lands, and within the lines of plaintiffs' grant. As a conclusion of law, the trial court decided that the plaintiffs were not the proprietors of any lands adjacent to the land under water west of the Hudson River Railroad, but that said railroad company was the adjacent proprietor at said point, within the meaning of the

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statute which forbids the commissioners of the land office from making water grants to any person except the proprietor of the adjacent land ; and, consequently, the grant to the plaintiffs, so far as it purports to convey lands west of the railroad, was void, and dismissed the complaint. The judgment entered upon such dismissal having been affirmed by the General Term the plaintiffs appeal to this court.

The powers of the commissioners of the land office are defined by the Constitution to be "such as now are or hereafter may be prescribed by law," and may be found in 1 Revised Statutes (7th ed.) page 573. By section 67 of the statute referred to, they may grant so much of the lands under the waters of the navigable rivers and lakes as they shall deem necessary to promote the commerce of the state, etc., but the statute provides : "No such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant that shall be made to any other person shall be void." Unless, therefore, the plaintiffs have shown themselves to be the owners of the lands adjacent to the lands described in the letters patent to them, the grant was not within the jurisdiction of the commissioners of the land office and is void.

From the earliest history of the state its policy has been to grant the lands under water along the shores of the navigable rivers and lakes, for the purpose of promoting the commerce of the state.

At the ninth session of the legislature, the commissioners of the land office were authorized to grant so much of the lands under the waters of the navigable rivers as they should deem necessary to promote the commerce of the state, provided that no such grant should be made to any person other than the proprietor or proprietors of the adjacent lands. (Chap. 67, Laws of 1786.) The policy thus indicated has never been departed from, and in all subsequent statutes upon this subject words of the same meaning and import are to be found.

At the time of the enactment of these laws the expression "proprietors of the adjacent land" referred to a distinct class

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of land-owners and included all whose uplands were bounded by the shores of the navigable rivers and lakes. All such had ready access to the waters over and from their own lands, and grants of the land below high-water mark were made for the purpose of erecting thereon docks and wharves from which commerce upon the water could be carried on. In confining the authority of the commissioners to make grants to the upland proprietor, the state not only recognized the right of the land-owner to have access from his own land to the water, but probably adopted the most economical way of promoting intercourse and building up trade and commerce between its different sections.

The upland would furnish materials out of which to construct the necessary docks upon the river, and over it there would be ready access to the surrounding country. For the purpose of making the necessary structures and improvements on the water front, and also for the purpose of collecting the products of the surrounding country and distributing the merchandise carried on the water, ownership of the upland would, therefore, in most cases, be a necessity to the dock owner.

The same class of proprietors still exist, and it is not perceived but that the reason for confining the grants to such proprietors is as potent at the present time as before the construction of a railroad along the east shore of the river. As I have already stated, the grants were limited to the owners of the adjacent upland. In this case the railroad is not an owner of the upland. Its road is constructed through the waters of the river some distance from the shore, leaving a bay of considerable size between the railroad embankment and the original shore line. Into this bay the tide ebbs and flows, and the plaintiffs' lands are washed by the waters of the river. The plaintiffs come, therefore, directly within the class of persons indicated by the statute to whom grants of land under water may be made. But it is very plain that no grant to the plaintiffs could promote the commerce of the state upon the river, unless it included the land west of the railroad, upon which to construct docks and the right to cross the railroad

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tracks. A grant, therefore, that did not include land west of the railroad would be ineffectual to carry out the only purpose for which the state has authorized such conveyance to be made. The important question, therefore, is, can the railroad company be regarded, within the meaning of the statutes upon the subject of water grants, as an "adjacent owner" to whom the commissioners of the land office could grant lands under water for the promotion of commerce upon the river. It is very clear, I think, that it cannot. A railroad corporation has no capacity to acquire lands for any purpose except such as is defined in its charter. It may take and hold lands for railroad purposes, but it is not necessary to cite authorities to show that it could engage in no business, except such as would be incidental to the railroad business, and come plainly within the scope of its charter. Being a creature of law, it possesses those properties only which its charter confers upon it, either expressly or as incidental to its existence. It is not important to determine what estate the railroad company took in the land acquired for the construction of its road. It may be conceded to be a fee. The statute makes it such. The more pertinent inquiry is, what capacity had it to deal with the lands it acquired? If that capacity was a general one and equal to that possessed by a natural person, there would be some ground to argue that it was an "adjacent owner" within the meaning of the statutes relating to water grants. But if it was, as I have stated it to be, a limited one, and the corporation could not make use of the lands for the purpose of promoting the commerce of the state upon the river, then it does not come within the class of persons named by said acts, and could not be a grantee of state lands for the purposes named in the statutes.

The question presented here is not like the one decided in *Gould v. Hudson River Railroad* (6 N. Y. 522.) That was an action for damages claimed to have been sustained by the plaintiff by reason of being deprived of access to the channel of the river with boats and vessel from his farm. The case was decided upon the authority of *Lansing v. Smith* (4 Wend. 9),

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and did not touch the validity of a grant of lands under water; and nothing is said in that case from which it can be determined what the court would have decided as to the validity of such a grant had one been made to the plaintiff. Nor is there anything in *Langdon v. Mayor, etc.* (93 N. Y. 29) applicable to the question involved in this appeal. What the court decided in that case was, that the plaintiff had an easement for passage to his wharf over lands of the city under water, lying outside of the wharf, and that the legislature could not, and, by the statutes under which the city was acting, had not authorized a destruction of such easement without compensation to the owner. In this case we are concerned solely with the question, whether the plaintiffs were, at the time of the grant to them from the commissioners of the land office, owners of the uplands adjacent to the land under water described in said grant, and the solution of this question depends upon the interpretation of the statutes relating to such grants. *Kingsland v. Mayor, etc.* (110 N. Y. 569) and *Williams v. Mayor, etc.* (105 id. 419) are for like reasons inapplicable to the question under discussion.

If the Hudson River Railroad Company held the land in front of plaintiffs' property, for the purpose of the erection of wharfs and docks thereon, to which access by the river was necessary (and many such cases would doubtless occur in the ordinary conduct of the railroad business) then an easement over the lands of the state under water for the purposes of access to such docks would be implied, and *Langdon v. Mayor, etc.*, and kindred cases would have some application.

But all such cases are provided for by the statutes relating to water grants, which require ample notice to be given of the application therefor to the commissioners of the land office, so that all parties whose interests are likely to be affected may be heard before the commissioners and their rights protected. The commissioners are empowered by the General Railroad Law (Chap. 140, Laws of 1850, §§ 25-49), to make grants of state lands to railroad corporations for railroad purposes. This includes power to grant lands under water for the erection of

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docks necessary to the transaction of the company's business. (*In re N. Y. C. & H. R. R. Co.*, 77 N. Y. 248.) They are also empowered to grant lands under water for the purpose of promoting commerce on the water. The whole subject of granting state lands for the purposes named is, therefore, committed to the judgment of the commissioners, to be exercised under ample notice to all parties interested. And I cannot see that there is likely to be any conflict of titles or that the rights of all persons are not fully protected.

It is sufficient to say, however, in this case, that there is no claim that the railroad company acquired or used its land for any purpose except the construction thereon of its road bed; and the ownership of lands used solely for that purpose does not constitute the railroad company an adjacent owner within the meaning of the statute relating to grants of lands under water. Nor does it appear that the Hudson River Railroad Company complain that the plaintiffs' grant is in violation of any of its rights, and if it is, such violations may very well be left to be remedied at the suit of that company.

But we think that the legislature have recognized the authority as existing in the commissioners of the land office to grant land under the water of the river lying outside of the railroad to the upland proprietor.

Chapter 283 of the Laws of 1850 provides that the commissioners shall make no grants that will interfere with the rights of the Hudson River Railroad Company. This act was passed after the general railroad law and after the construction of the Hudson River Railroad, and can have no application to grants made to anyone, except an owner whose shore line is east of the railroad, as only by such a grant could there possibly be any interference with the railroad company's rights. This statute seems to contemplate a grant of land under water west of the railroad to a proprietor whose upland is east of the railroad; that would be valid if the railroad company's rights were protected, and the power to make such grants is, therefore, implied.

If we turn now to the consideration of the statutes of the state

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which created the Hudson River Railroad Company, and authorized the construction of the railroad, it will appear, I think, that they are in harmony with the policy of the state with respect to granting lands under water for the promotion of commerce, and that the intent of the legislature was, so far as it was possible, to protect the upland owners along the east shore of the river in their access to the water and maintain their rights in the river unimpaired by the construction of the railroad. By section 15, chapter 216, Laws of 1846, said company was required to erect draw-bridges over the navigable streams and inlets crossed by its road, so as to admit the passage of vessels adapted to the navigation of such streams and of the river. In crossing bays of the river it was to construct bridges so as to admit of the passage of vessels to and from such bays; docks and wharves which were cut off from the river by said railroad were to be extended and improved so as to be restored to their former usefulness, and owners thereof were authorized to occupy the river front outside of the railroad for the erection and use of wharves and docks. By section 16, owners of land over which said railroad was constructed were given the right to cross the same, at some convenient place, for the purpose of managing their farms, and in all cases where the railroad passed between such lands and the usual place of access to the river and could not be conveniently crossed by reason of high embankments, deep cuts or otherwise, said company was required to construct and maintain convenient roads or passes for the passage of persons, cattle, carriages and teams, and give to them their usual access to the river.

Thus adequate provision was made to give to every owner of lands, bordering upon the river, easy access to the water; and the intention of the legislature appears to have been that the construction and maintenance of the railroad should interfere as little as possible with the rights of the riparian owner. In view of these provisions, which were intended to preserve to the upland proprietor his access to the river, we do not think that the creation of a railroad corporation, with authority to acquire lands and construct a railroad along the east

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shore of the river, can be said to have changed the policy of the state with reference to the promotion of commerce upon the river, or deprived the commissioners of the land office of the power to make grants of land under water for such purpose to the owner of the uplands.

The laws upon the subject of these grants should be read in connection with the provision of the charter of the railroad company, and should be construed in the light of the purpose for which they were enacted; and, so construed, there is no difficulty in upholding all the rights, powers and privileges which the state intended to confer upon the railroad company, and at the same time give effect in all proper cases to grants of land under water made by the commissioners of the land office outside of the railroad company's land.

The grant to the plaintiffs expressly reserved and excepted from the lands conveyed the rights of the Hudson River Railroad Company, and thus complies strictly with the statute of 1850, quoted above. We think the commissioners of the land office had power to make the grant and that it is valid.

The judgment should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur, except POTTER, J., dissenting.

Judgment reversed.

GEORGE F. HUSSNER et al., Respondents, v. THE BROOKLYN CITY RAILROAD COMPANY, Appellant.

Prior to 1877 defendant operated a horse car railroad on Third avenue in the city of B. By an ordinance of the common council of the city, pursuant to the act of 1873 (Chap. 482, Laws of 1873), it was authorized to run cars by steam motors between the city line on the south and Twenty-fourth street on the north. It did not stop its cars so propelled, however, at said street, but passed into and along it for some distance, backed them into Third avenue, and then in front of plaintiffs' premises, which are situated on the north-westerly corner of Third avenue and Twenty-fourth street, they were switched onto another track, making much noise, shaking plaintiffs' buildings, casting cinders, smoke and dust

114	433
121	591
114	433
123	13
114	433
128	567
129	86
114	433
134	14
134	331

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upon their premises, and interrupting the ordinary use of the street. In an action to recover damages, *held*, that plaintiffs, although not owners of the street, as abutting owners had such an easement therein as to enable them to insist, as against defendant, that it should be devoted only to the uses consistent with a public street; that the use of steam as a motive power in the manner stated was unlawful and in the nature of a nuisance, and plaintiffs were entitled to recover the damages sustained.

The evidence tended to show that said unlawful acts depreciated the rental value of plaintiffs' premises. *Held*, that such depreciation was a proper measure of damages.

Under the instructions of the court, recovery was had for such damages up to the time of the trial. No objection was made that the recovery should have been limited to the damages which accrued before the commencement of the action. *Held*, that the question could not be presented on appeal.

It seems the recovery is a bar to any future claim for damages up to the time of trial.

Plaintiffs' complaint alleged, in substance, that they owned the fee of the avenue to its centre, and that defendant unlawfully operated its cars within and upon their half of the avenue. On the trial plaintiffs waived any right to recover nominal damages for trespass and claimed only to recover the damages to their premises occasioned by the nuisance, and the court, in its charge, made the right to recover dependent upon the finding of the jury that there had been a substantial injury to the premises and that the question as to whether they were bounded by the centre of the avenue had no importance. Defendant's counsel requested the court to charge that plaintiffs had no title to the fee in the avenue and that defendant had not trespassed upon their property. The court declined to charge other than as before charged. *Held*, that, as the question of title and trespass was, by the waiver of plaintiffs' counsel and the charge made, out of the case, defendant could not have been prejudiced by the refusal.

(Argued April 23, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 23, 1886, which affirmed a judgment in favor of plaintiffs, entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the material facts are stated in the opinion.

Samuel D. Morris for appellant. The proof so clearly preponderated against the plaintiffs' claim for damages that a

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nonsuit should have been granted. A mere scintilla of evidence will not sustain a recovery. (*Dwight v. G. L. Ins. Co.*, 103 N. Y. 359; *Improvement Co. v. Mason*, 14 Wall. 442.) The plaintiffs did not own the fee to the centre of the street. (*Wetmore v. Law*, 34 Barb. 515; *English v. Brennan*, 60 N. Y. 609; *White's Bk. v. Nichols*, 64 id. 65; *Augustine v. Britt*, 15 Hun, 395; 80 N. Y. 647.) Defendant was entitled, therefore, to have the jury charged as requested, that the plaintiffs have no title to the fee in Third avenue, and that the defendant has not trespassed upon the plaintiffs' property in operating its road in front of plaintiffs' property. (*Paulitsch v. N. Y. C.*, 4 East. Rep. 922; *Green v. White*, 37 N. Y. 405.)

George W. Roderick for respondents. The defendant created a nuisance in the highway, such use of the highway being in direct violation of law, not having obtained the requisite consents of the mayor and common council of the city of Brooklyn, and of the plaintiffs, and the plaintiffs, as abutting lot owners, even though their title does not extend to the soil of the highway itself, having an easement in such highway, and having suffered special damages by reason of the nuisance to their premises, are entitled to maintain an action to recover the damages, and even enjoin such unlawful use of the highway by an action in equity. (*Mahady v. B. R. R. Co.*, 91 N. Y. 148; *Uline v. N. Y. C. R. R. Co.*, 101 id. 98; *Lahr v. M. R. R. Co.*, 104 id. 291; *Henderson v. N. Y. C. R. R. Co.*, 78 id. 423; *Story v. El. R. R. Co.*, 90 id. 122; *Milhau v. Sharp*, 27 id. 611, 624, 625; *People v. Kerr*, Id. 193; *Davis v. Mayor, etc.*, 14 id. 507; *Corning v. Loweree*, 6 Johns. Ch. 439; *Atty.-General v. Cohoes*, 6 Paige, 133; *Williams v. N. Y. C. R. R. Co.*, 16 id. 97, 111; *Gardner v. Newburgh*, 2 Johns. Ch. 168; *Francis v. Schoelkopf*, 53 id. 152; *Willoughby v. Jenks*, 20 Wend. 96; *Presb. Soc. v. A. & R. R. Co.*, 3 Hill, 567; *Wager v. T. U. R. R. Co.*, 25 N. Y. 561; *Craig v. R., etc., R. R. Co.*, 39 id. 404; *Carpenter v. O. R. R. Co.*, 24 id. 265; 18 Am. Law Rep. 707; *R. G. L. Co. v. Calkins*, 62 id. 386; *Mahon v. N. Y. C. R. R. Co.*, 24 id.

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658; *People ex rel. Ennis v. Schroeder*, 76 id. 160; 12 Hun, 413; *North v. Cary*, 4 T. & C. 357; *N. Y. & B. S. M. Co. v. City*, 71 N. Y. 580; 2 R. S. 555, § 27; *People v. Nichols*, 52 N. Y. 481.) The defendant will not be permitted on this appeal to claim that it was error on the part of the trial judge to permit the plaintiffs to recover damages to the date of the trial instead of to the date of the commencement of the action. (*Uline v. N. Y. C. R. R. Co.*, 101 N. Y. 98; *Lahr v. M. R. R. Co.*, 104 id. 293; *McGovern v. N. Y. C. R. R. Co.*, 67 id. 417.) It is immaterial that the nuisance was created before the plaintiffs became the owners of the property; its continuance from day to day after the plaintiffs became such owners amounted to the creation of a fresh nuisance. (*Uline v. N. Y. C. R. R. Co.*, 101 N. Y. 98; *Lahr v. Met. El. R. R. Co.*, 104 id. 295.)

BRADLEY, J. The action was brought to recover damages to the plaintiffs' premises, alleged to have been suffered by the unlawful running and operating of the defendant's cars upon the street in front of such premises, which are situated on the north-westerly corner of Third avenue and Twenty-fourth street in the city of Brooklyn. Prior to 1877 the defendant operated a horse car railroad on the avenue, and then pursuant to an ordinance, authorized by Laws of 1873, chapter 432, steam motors were applied by the defendant to run its cars between the city line on the south and Twenty-fourth street on the north. For the purposes of this review it must be assumed that the defendant had the right to use such motive power to run its cars upon Third avenue between those points, and that the plaintiffs had no right to complain of the exercise of such right. The subject of their complaint is, that the defendant's cars, so propelled, did not stop at Twenty-fourth street, but that after passing into and along it for some distance, they were backed into Third avenue on the north side of that street, and there, in front of the plaintiffs' premises, were switched on to the southerly bound track, and in so doing, as evidence on the part of plaintiffs tends to prove, much noise

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was made, the plaintiffs' buildings shaken some, and cinders, smoke and dust discharged and cast upon their premises, and the ordinary use of the street there interrupted to the annoyance of the occupants, and, as a consequence, the value of the use of the property was depreciated. It is said this was continued, with only a few minutes intermission between trains, daily, from early in the morning until midnight. The plaintiffs' building occupies fifty feet, fronting on the avenue, and consists of three stores on the ground floor and a dwelling over the central portion of them. The plaintiffs, as abutting owners, had such an easement in the street as to enable them to insist, as against the defendant, that it should be devoted to such use only as was consistent with its purposes as a public street. (*Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122; *Lahr v. Met. El. R. R. Co.*, 104 id. 268.) It will be assumed that the defendant had acquired the right to operate a horse railroad on the avenue in front of the plaintiffs' place. The right to do so, given pursuant to statute, is not deemed inconsistent with street uses. (*People v. Kerr*, 27 N. Y. 188; *Mahady v. Bushwick R. R. Co.*, 91 id. 148.) The use of steam as a motive power in the movement of its cars, at the place in question, was without right on the part of the defendant, and so far as it, and the manner in which it was used there in the operation of the cars, had the effect to molest the occupants in the use and enjoyment of the premises as indicated by the evidence, on the part of the plaintiffs, it was in the nature of a nuisance. Whether any substantial injury resulted to the premises and their use from such causes, was a question of fact for the jury upon the conflicting evidence in that respect. The inquiry to which the proof was directed, had relation to the effect upon the rental value of the premises, and there was evidence tending to show, that the consequence of such cause was a depreciation of such value to the extent fully equal to the amount recovered. The weight of the evidence on that subject is not here for consideration. It may be assumed, in view of the instruction to the jury, that recovery was had for such damages, so sustained, up to the time

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of the trial, although the plaintiffs were entitled to recover such only as had accrued at the time of the commencement of the action. (*Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Pond v. Met. El. R. R. Co.*, 112 id. 186.) But as that question was not raised at the trial, it is not here for consideration. If, however, the fact is as assumed in that respect, the recovery may be effectual as a bar to any future claim for damages sustained there by the plaintiffs prior to the time of the trial. (*McGovern v. N. Y. C. & H. R. R. R. Co.*, 67 N. Y. 417.)

The court was requested to charge the jury that the plaintiffs had no title to the fee in Third avenue, and that the defendant had not trespassed upon the plaintiffs' property in operating its cars in front of their property. The court declined to do so, other than as before charged, and the defendant's counsel excepted. The plaintiffs in their complaint set forth the description of the premises in the same manner as it was represented by the deeds put in evidence, and alleged that the ancestor of the plaintiffs, and from whom they derived their title by descent, was seized and possessed of the premises so described, "subject only to the public easement of a common street or highway in that part thereof called Third avenue." And they also alleged that, since the plaintiffs became such owners, the defendant had unlawfully operated its cars, propelled by steam, upon that portion of their premises within and bounded by the center line of the avenue. It is by reason of this element of trespass alleged in the complaint that the defendant's counsel contends the court should have charged as requested. Assuming, as we do, that such request was supported by the fact embraced in it in respect to the boundary of the plaintiffs' premises, the defendant was entitled to the charge as requested, unless the matter was obviated by what had occurred at the trial. The defendant's counsel had moved the court to require the plaintiffs to elect whether they would claim to recover for trespass or nuisance, and the court remarked that if the plaintiffs would waive their right to recover nominal damages for a trespass and ask to recover only

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substantial damages for injury to the premises, the motion would be denied. Thereupon the plaintiffs' counsel waived any right they had to nominal damages for trespass. And in the charge to the jury the court so treated the case, and made the right of recovery dependent upon the finding of the jury that there had been a substantial injury to the use of the plaintiffs' premises by the operation of the cars with steam in front of the premises, and charged them that the question whether they were bounded by the center of the avenue had no importance. It is, therefore, clear that the question of title to land within the street was, by the waiver of the plaintiffs' counsel and the charge of the court, out of the case as it went to the jury, and that the defendant could not be, and was not, in any manner prejudiced by the refusal of the court to charge as so requested, or by the charge as made in that respect.

We have examined all the exceptions appearing in the record to have been taken by the defendant, and fail to see in them any support for the charge of error in the rulings of the court.

The judgment should be affirmed.

All concur, except BROWN, J., not sitting.

Judgment affirmed.

**CECILIA B. O'REILLEY, Appellant, v. THE CITY OF KINGSTON,
Respondent.**

114	439
130	303
114	439
142	125

In an action to set aside, as illegal and void, an assessment upon lands of plaintiff for paving a street in the city of K., it appeared that by an ordinance of the common council, passed at the same time with the one authorizing the improvement, the grade of the street was declared to be "changed and amended." The city charter (Chap. 150, Laws of 1872, as amended by chap. 429, Laws of 1875), prohibits a change in the grade of a street except upon petition of a majority of the owners of the lineal feet frontage on that part of the street to be graded. No such petition was presented. There was no record of any previously established grade of the street. It appeared that some attempt had been made to establish a grade and to conform the street to it; but that the surface of the street was very irregular, there being low places in which the water would

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stand, and one side in some places lower than the other side, and the grade was not uniform. When the street was paved it was filled in places. Under the contract for the work the change in the actual surface of the street did not increase the expense, no charge being made for the filling, and the assessment was simply for the paving. The trial court was requested to find, as a fact, that the change of grade did not increase the cost or the assessment on plaintiff's lot; the request was declined as "immaterial." *Held*, error; that it devolved upon plaintiff to show that she was damaged by the assessment made; also, that a material change in the grade had been effected by the ordinance, the expense of which entered into the assessment; that the conforming of the road-bed necessarily required some grading, but did not necessarily effect a change of the established grade; and that the evidence showed there was no change which increased plaintiff's assessment.

The apportionment it appeared was made in proportion to the frontage of each lot upon the street; some of the lots were vacant, others occupied by valuable buildings. *Held*, that, as under the charter, it was the duty of the assessors to determine the benefits derived by the owners, in thus determining they acted judicially, and their judgment as to the amount of benefit derived could not be reviewed here unless they acted upon an erroneous principle in making the assessment; that the assessment on each lot, in accordance with the number of feet front, was not necessarily an erroneous principle, if in the judgment of the assessors the owners were benefited in that proportion.

There was a street railway whose tracks were, before the improvement, in, but along the side of the street. The railroad company agreed with the city to and did remove its tracks to the centre and paved the street between its rails. The charter provides that no part of the expense of such an improvement shall be assessed on lands "not bordering on or touching the street." It was objected that the railroad company should have been assessed. *Held*, untenable; that the land occupied by it did not border on or touch the street within the meaning of the charter, it being simply a part thereof.

The provision of the Code of Civil Procedure (§ 46), providing that a judge shall not sit as such or take any part in the decision of a cause or matter if he is related to any party to the controversy within the sixth degree, refers to a judge, justice or other person holding a court *ex nomine*; it has no application to assessors.

Said charter provides that the assessment shall be upon the "owners or occupants and upon the land deemed to be benefited;" also, that if an assessor is interested in property liable to be affected by such an assessment, the common council may appoint a freeholder to act in his place. It appeared that the son of one of the assessors owned one of the lots assessed. Upon it is a hotel and the assessor lived there. It did not appear that the son lived on the premises, or who ran the hotel. It was claimed that the assessment was void because said assessor was interested.

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Held, untenable; that the evidence failed to show that the assessor was an "occupant" within the meaning of the charter, or that he was interested in the property assessed.

The latter alleged defect was not set forth in the complaint. It was proved by evidence *de hors* the record, under objection by defendant's counsel. *Held*, that the evidence was improperly received; and that the question, therefore, was not properly presented on appeal.

Reported below, 39 Hun, 285.

(Argued April 24, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made January 26, 1886, which reversed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

The nature of the action and the material facts are stated in the opinion.

John E. Van Etten for appellant. The trial court was right in judging the assessment void, because the paving for which the assessment was made involved a change of the established grade of the avenue paved without any petition or consent of adjacent owners. (Laws of 1805, chap. 87; Laws of 1854, chap. 184, §§ 33, 34, 36; Laws of 1861, chap. 145, title 5; *In re Morris*, 2 Hill, 14; *In re Phillips*, 60 N. Y. 21, 22; *In re Walter*, 75 id. 324; *In re Banta*, 60 id. 165; *Littlefield v. Vernon*, 41 id. 123, 136; 49 id. 587; *In re John and Cherry Streets*, 19 Wend. 675; *Genet v. City of Brooklyn*, 69 N. Y. 506, 516; *In re Second Ave. M. E. Church*, 66 id. 395; *Merritt v. Village of Port Chester*, 71 id. 309.) The assessment is void because the assessors in making it went upon a rule wrong in law. Instead of apportioning the tax according to the benefit received, they did it according to an arbitrary fixed rule of \$1.45 per lineal foot front on the avenue, without regard to depth, value or any other consideration. (*People v. J. C. Court*, 55 N. Y. 604, 605, 606, 607; *Kennedy v. City of Troy*, 77 id. 493, 494; 12 Hun, 182; *Clark v. Village of Dunkirk*, 75 N. Y. 612; *Stewart v. Palmer*, 74

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id. 183; *People v. Mayor, etc.*, 63 id. 291, 300; *In re W. and A. Streets*, 19 Wend. 678, 690; *In re Roberts*, 81 id. 62.) The horse railroad company was liable to assessment and taxation for the bed of its road as real estate. (2 R. S. [7th ed.] 981; Laws of 1881, chap. 293; *People ex rel. F., etc., R. R. Co. v. Cassidy*, 46 N. Y. 46; *Smith v. Mayor, etc.*, 68 id. 552, 555.) The road when built is private property, and is not and does not form a part of the street for the use of the public at large. (*B. C. R. R. Co. v. B. C. R. R. Co.*, 32 Barb. 353, 361, 372.) The entire building of the road devolved upon the railroad company exclusively. (*Davis v. Mayor, etc.*, 14 N. Y. 506.) The duty to keep the roadway of the streets in repair, which devolved upon the railroad company when the company elected to take the benefit of the license granted it, was a duty, the benefit of which was not confined to the municipality only, but it also enured to the public and those who might otherwise be charged with the expenses of the work, to wit, especially adjacent owners. (*City of Brooklyn v. B. C. R. R. Co.*, 47 N. Y. 476, 485; *Walker v. Caywood*, 31 id. 51; *Eno v. Mayor, etc.*, 68 id. 215, 219; *B. C. R. R. Co. v. B. C. R. R. Co.*, 32 Barb. 358; *State of N. Y. v. Mayor, etc.*, 3 Duer, 119; *Riddle v. Proprietors of Locks*, 7 Mass. 169, 184, 185.) The common council had no right to direct or the assessors to include in the assessment upon adjoining owners any part of the expense incurred by paving between, over and under the projecting part of the ties of the railroad. (*Elmendorf v. City of Albany*, 17 Hun, 81.) The assessment is also void for the reason that one of the assessors making the assessment was disqualified from acting, by reason of his occupancy of property on the line of the street subject to assessment, and actually assessed, and also of consanguinity to the owner thereof. (*Regina v. C. Com.*, 1 Ad. & E. 468; *Regina v. A. C. Co.*, 14 id. 854, 865; *Regina v. Justices of Helfordshire*, 6 id. 753, 756.)

William Lounsbury for respondent. It was not sufficient to show that the street had been graded by the former village

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of Kingston. It was necessary to show both an establishment of grade and a working to it, so as to make an assessment, and that the owner had been subjected to costs by reason of a former establishment of a grade. (*In re Brady*, 85 N. Y. 268, 270.) The question of increase of cost by the change of grade is not immaterial. (*In re M. L. Ins. Co.*, 89 N. Y. 530.) If an assessment is void because it is made by lineal feet, it is no cloud upon the title. (*Stewart v. Palmer*, 74 N. Y. 183; *Horn v. Town of New Lots*, 83 id. 100-104.) Whether the assessment was equitably apportioned rested in the judgment of the assessors alone, and the court cannot review that determination. (*In re Eager*, 46 N. Y. 100; *In re Cruger*, 84 id. 619.) If it was proper for the court to determine by evidence the question whether the assessment was equitably made, then it was error to exclude the evidence upon that question offered by the defendant on the examination of one of the assessors who made the assessment. (*Kennedy v. City of Troy*, 77 N. Y. 493.) The agreement between the railroad company and the city upon a division of the pavement was apparently equitable, based upon occupancy, and lawful. (*In re Appleby*, 26 Hun, 427; *Elmandorf v. City of Albany*, 17 id. 81; *Kennedy v. City of Troy*, 77 N. Y. 493; *Western R. R. Co. v. Nolan*, 48 id. 513.) The assessors were not judicial officers and disqualified by the Code, section 44. (2 R. S. 275, § 2; *People v. Wheeler*, 21 N. Y. 82; *Foot v. Styles*, 57 id. 399.) The assessment does not appear to be tainted with fraud. The errors alleged are technical and not substantial, and are not of a character to avoid it. *In re Brady*, 85 N. Y. 268; *In re Merriam*, 84 id. 596; *In re Cruger*, Id. 619.)

HAIGHT, J. This action was brought to set aside and adjudge void an assessment made upon lands of the plaintiff, for the paving of Union avenue in the city of Kingston. It is claimed in the first place that the assessment is void because of the change of the grade of the street without the consent of the adjoining owners, and that the expense of such change was

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incorporated in the assessment. The ordinance was passed on the 23d day of May, 1879, and is entitled "an ordinance for amending the grade of Union avenue from St. James street to Greenkill avenue." Section 1 of the ordinance provides that "the grade of that portion of Union avenue in said city, lying between the southerly line of St. James street and the northerly line of Greenkill avenue, is hereby changed and amended, and shall be as follows." It then proceeds with the specific description of the grade as established. On the same day another ordinance was passed providing for the pavement of Union avenue, lying between the easterly line of Holmes street and the southerly line of Albany avenue, excepting that portion of the roadway occupied by the tracks of the Kingston and Rondout Horse Railroad Company. That ordinance provided for the pavement of the street and that it should be "adjusted and regulated to conform to the proper grades;" that twenty-five per centum of the cost should be paid by general tax upon the city, and that seventy-five per centum of such cost should be defrayed by special assessment upon such portions of the real estate of the city bordering on or touching the avenue, and against the owners thereof, as the assessors of the city shall deem more immediately benefited by such improvement. The charter of the defendant prohibited the change of the grade of a street which had been established, except upon the petition of the owners of a majority of the lineal feet frontage on the part of the street to be graded, etc. No petition of a majority of the owners of the lands fronting upon the avenue was presented to the common council for a change of the grade, and, consequently, the ordinance was without authority, if a material change was effected by it. The trial court was requested to find as a fact that the change of the grade of the new pavement did not increase the cost of the work, and that the amount of the assessment upon the plaintiff's lot was not increased by any change made in the grade. The request was refused in these words: "Declined, and as I think immaterial."

The General Term held that this request should have been

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found, and that it was material. The General Term had the power to review the facts and determine whether a finding was against the weight of evidence or whether a request to find was supported by a preponderance of evidence and should have been found. As we have seen, the trial court did not base its refusal to find the request upon the ground that it was not supported by the evidence, but chiefly upon the ground that it was deemed immaterial. In determining these questions it becomes important to ascertain whether there was any material change in the grade made by the ordinance complained of. In the first place, there is no record of any previously established grade of the street, yet it appears, from various resolutions of the directors of the village of Kingston, that some attempt had been made to establish a grade, and to grade the street so as to conform to that established; but in no place are we given a description of the grade so established, only as it appears from the testimony of the witnesses to the effect that the street was worked to conform to the stakes that were set by the surveyor, and that the summit of the street was at a different point from that established by the ordinance of 1879; that when the street was paved in some places it was filled in so as to raise the surface of the street five or six inches, and in one place about eighteen inches. On the other hand, there is abundant evidence, that is not contradicted, showing that the surface of the street as it existed prior to the pavement was very irregular; that the side of the street in some places was lower than the other side; that there were low places in which the water would stand, and that the grade was not uniform. Under this evidence, even if we concede that there was a change in the grade from that previously established, we are left powerless to determine as to the particulars or the extent of the change made. If a previous grade had been established, we must assume that it was intended to be comparatively uniform so far as the surface was concerned, and that it did not provide for holes or low places in which the water would stand, or that one side of the grade should be lower on one side of the street than on the other.

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If there was no material change in the grade, or if the changes made were of a trivial and unimportant character it might well follow that the cost of the pavement was not increased. It devolved upon the plaintiff to show that she was damaged by the assessment made, and in order to invalidate the assessment she must show that a material change in the grade had been effected by the ordinance; that the ordinance was void and that the expenses of such change entered into the assessment.

Upon the question of the expenses of the grading, and as to whether it entered into the assessment, we have, first, the testimony of the engineer of the city to the effect that no change in the actual surface of the street, which was made by the paving, made any additional expense which increased the amount of the final estimate. We then have the agreement with the contractors in which they undertake to grade, regulate and pave the street, and to receive therefor "the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects performing and completing the same, to wit: For the Telford pavement, per square yard, the sum of 77 cents, including all excavations therefor and labor and materials used or employed thereon; for cobblestone pavement in gutters, per square yard, the sum of 37½ cents, including all excavations therefor and labor and materials used or employed thereon; for regulating and adjusting the curb and gutter, per lineal foot, the sum of 3 cents; for regulating and relaying sidewalks, per lineal foot, the sum of 3 cents." No charge appears to have been made, or agreed to be paid, for any filling of any irregular or uneven surface of the road-bed. We next have the resolution of the council passed after the submission of the final estimate of the cost of paving the avenue, in which the assessors are directed to assess seventy-five per cent of the expenses of *such paving* as determined by such final estimate upon the real estate bordering on or touching Union avenue as the assessors shall deem to be more immediately benefited by such improvement.

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Union avenue, before the pavement, was occupied by a street railroad which ran along the side of the street near the gutter. It had been occupied by a plank-road which, some years before, had been taken up and a stone-road substituted in the place of it. When the street was repaved the street railroad company's track, under an arrangement made between the company and the city, was removed to and constructed in the center of the street. The paving of the street made it necessary to remove the stone-road previously existing, and to conform the surface of the road-bed for the new pavement. The conforming of the road-bed, of necessity, required some grading, but did not necessarily effect a change of the established grade.

Under the evidence to which we have called attention, it appears to us that the conclusion was warranted that there was no change of the grade which increased the cost of the pavement, and that the assessment upon plaintiffs' lot was, consequently, not increased by any such change, and that the General Term properly held that such facts should have been found by the trial court. (*James v. Cowing*, 82 N. Y. 449.)

If there was no cost of grading the street to conform to a changed grade embraced in the assessment made upon the plaintiff's premises, then the plaintiff would not be injured by reason of the assessment, and would have no standing in court to have it adjudged void; consequently, the facts requested to be found by the trial court were material.

Objection is made to the assessment upon the ground that it was apportioned among the owners of the lots fronting upon the avenue in proportion to the frontage of each lot upon the street, some of the lots being vacant and others occupied by valuable buildings. The charter provides that "the common council shall have power to cause any street, alley, lane, highway or public ground or any part or parts thereof in said city to be graded, paved or repaired * * * and to determine by resolution what part or portion, if any, not exceeding twenty-five per centum of the expenses of such grading, paving etc., * * * shall be paid by a general tax upon the city, and such part or portion of such expenses shall thereupon become

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a charge upon said city and shall be added to and raised with the next general assessment and tax for city purposes; and what part or portion of such expense shall be defrayed by special assessment upon such portions of the real estate in said city and against the owners thereof as the assessors of said city shall deem more immediately benefited by such improvement. No part of the expense of grading or paving a street shall be assessed upon any lands not bordering on or touching said street." (Laws of 1872, chap. 150, § 98.)

It will be observed that the land to be assessed must be that bordering on or touching the street, and that it was the duty of the assessors to determine the benefits derived by the owners of such land as does border on or touch the street improved. In thus determining the benefits the assessors act judicially. They had an opportunity to examine the premises personally, and were thus possessed of information which cannot be brought before a court on review, consequently their judgment upon the question, as to the amount of benefit derived, cannot be here reviewed, unless they acted upon an erroneous principle in making the assessment. It appears that they reached the conclusion that the tax should be apportioned among the owners of the real estate bordering upon the street according to the number of feet front owned by each individual. This is not necessarily an erroneous principle, if it was their judgment that each owner was benefited in that proportion. On the other hand, it may be the most just and equitable of any that could be adopted. (*In the Matter of Cruger*, 84 N. Y. 619; *In the Matter of Eager*, 46 id. 100, 109.) Further objection is made to the assessment upon the ground that the street railroad company was not assessed by the special assessment ordered by the common council. It appears that the company had a grant from the city to construct and operate a street railroad through Union avenue, and before the paving it entered into an agreement with the city to remove its tracks to the center of the street, and to pave the street between its rails with block stone, and that this was done. It does not expressly appear that the pavement

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between the rails by the street railroad was to be in lieu of an assessment, and yet such was doubtless the understanding of the parties. But it appears to us that the objection is answered by the statute and resolution of the council directing the assessment. As we have seen, the statute provides that no part of the expense of grading or paving the street shall be assessed upon any lands not bordering on or touching the street; the resolution of the council is that the expenses of the pavement "be defrayed by a special assessment upon the real estate in said city bordering on or touching said Union avenue, as the assessors of said city shall deem to be more immediately benefited by such improvement."

The fact that no assessment was made upon the street railroad company is evidence that the assessors did not deem the company "immediately benefited." Under the statute and resolution, it is the land bordering on or touching the street that is to be assessed. The land occupied by the street railroad company is a part of the street; it does not border on the street nor does it touch the street, for, being a part of the street, it is the thing touched and not which does the touching. A street cannot well touch itself, for touching ordinarily implies different bodies or parcels brought in contact with each other.

It is now contended that the assessment is void for the reason that one of the assessors was interested in one of the lots assessed; that he was the father of the owner to whom it was assessed, and lived thereon. No such defect was alleged in the complaint. The General Term, however, was of the opinion that the question being jurisdictional, it was properly before the court for consideration. But is this so? The record of the assessment disclosed no such defect. It appears to have been made by the city assessors, and it does not appear that either had any interest in the property assessed, or was related to any of the owners thereof. Had such interest or relationship appeared, the proper mode of review would have been by *certiorari*. It is the fact that such interest or relationship does not appear upon the record, that a court of equity

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is given jurisdiction. The interests or relationship of the assessor can only be determined by extrinsic evidence *de hors the record*. Suppose, therefore, that this defect was the only one upon which the plaintiff relied to annul the roll, and that the complaint alleged that the roll was illegal without specifying in what the illegality consisted. Can there be any doubt but that the complaint would be demurrable? There would be nothing upon which the defendant could take issue, or that would apprise it of the claim it was to meet. It appears to us that the question is fully answered by the case of *Knapp v. City of Brooklyn* (97 N. Y. 520-523). It may be urged that evidence of the relationship of the assessor, etc., was received upon the trial. Very true, but it was admitted under the objection of the defendant, and the city ought not now to be held responsible for the evidence so improperly received under its objection. But, assuming that the question is properly before this court for consideration, we are of the opinion that no cause is shown for equitable relief. So far as the question of consanguinity or affinity is concerned, it is sufficient to say that the provisions of section 46 of the Code of Civil Procedure, which provides that a judge shall not sit as such or take any part in the decision of a cause or matter if he is related by consanguinity or affinity to any party to the controversy within the sixth degree, refer to judges or justices or other persons holding a court *eo nomine*, and have no application to assessors. Were it otherwise, many of the small villages would be unable to find persons qualified to serve as assessors. (*Foot v. Stiles et al.*, 57 N. Y. 399-406; *People v. Wheeler*, 21 id. 82-86.)

The question of interest requires more consideration. The defendant's charter provides that "if the assessors or any or either of them be interested in property liable to be affected by such assessment, or from any cause incapable of acting, the common council may appoint in place of such assessor, that is disqualified, a disinterested freeholder of said city, residing therein, to perform the duties of such assessor under this section as to such assessment." (Laws

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1872, chap. 150, § 98.) "May" should, doubtless, be read as *must*; and, under the charter, the duty devolved upon the common council to appoint a disinterested freeholder in case one of the assessors was interested in the property to be affected by the assessment. The question is, therefore, whether assessor Osterhoudt was interested in the lot on which he lived and which was assessed to his son William, who was the owner thereof. It is claimed that Osterhoudt, as occupant, was liable to be assessed, and was consequently interested. The provisions of section 98 of the charter upon this point are not in entire harmony. The first clause provides that the "expense shall be defrayed by special assessment upon such portions of the real estate in said city *and against the owners* thereof as the assessors of said city shall deem more immediately benefited," etc. Under this provision the assessment is to be made against the "owners," and the occupants are not mentioned. But further on the assessors are required to make a "certificate of such special assessment, entering therein *the names of owners or occupants* of the land assessed," etc. And, again, it provides that "they shall make a just and equitable assessment of the amount fixed by the common council *against the said owners or occupants* and upon the lands deemed to be benefited," etc. We have not thought it necessary to construe these provisions and determine whether an occupant can be personally bound or made liable to pay a special tax of this nature, for we are of the opinion that the question should be disposed of on another ground. It appears from the evidence that Osterhoudt lives in the house on the lot assessed to his son William, and that William is the son; that the house is a hotel, and was run as such at the time of the assessment. It does not appear whether William, the owner, lived on the premises or who ran the hotel. If William lived in and conducted the hotel, he was both owner and occupant, and no other person could be properly assessed. If the hotel was run by some other person and Osterhoudt lived with him as a guest, he would not be an occupant, within the meaning of the statute, liable to be assessed. Showing that Osterhoudt lived upon

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the premises was not sufficient to establish that he was interested. To do that, it must appear that he was an occupant, within the meaning of the statute, and liable to be assessed for the improvement as such.

It follows that the exceptions taken to the finding of fact and conclusion of law upon this subject were well taken, and that the order of the General Term should be affirmed and final judgment ordered for the defendant on the stipulation, with costs. So ordered.

All concur, except PARKER, J., not voting; BRADLEY J., concurring in result.

Order affirmed and judgment accordingly.

FREDERICK A. BALDWIN et al., Respondents, v. IRA E. DOYING et al., Impleaded, etc., Appellants.

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To make exceptions to a refusal of a referee to find a fact sufficient ground for a reversal, it must appear that had he found as requested the result would have been affected.

In an action upon a promissory note the answer alleged that the note was procured to be discounted by one F. in pursuance of a corrupt and usurious agreement, whereby he received and charged a greater rate of interest than prescribed by law. Upon the trial defendants failed to show by whom the note was discounted, or that the person so discounting it charged more than the legal rate. They proved, and requested the referee to find, that one who had previously assisted in procuring discounts of paper made and indorsed by the same parties, agreed to discount or procure the note to be discounted for five per cent of its face; that he procured the note to be discounted, and subsequently gave to the indorser, with whom he made the agreement, a check of F. for the face of the note, less five per cent, as the proceeds of the note. It appeared that F. did not discount the note. These requests were refused and exceptions taken. Held, that the refusals to find did not constitute error justifying a reversal of the judgment, as if the referee had found as requested, this would not have justified a determination in favor of defendants; that the burden of proof was upon them to show the usurious exaction by the party discounting the note, and such result was not accomplished by proof of payment of a sum of money exceeding the legal rate of interest to a party undertaking for a consideration to procure the note to be discounted; that if D. acted as agent for the defendant, the plaintiffs' rights could not

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be affected by proof of transactions between defendants and their agent; that even if it could be held that in what he did D. was the agent of the parties discounting the note, to establish their defense, it was incumbent upon defendants to show that, as such agent, he took the bonus with the knowledge and consent of his principal.

(Argued April 25, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 1, 1886, which affirmed a judgment in favor of plaintiffs, entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

E. J. Myers for appellants. A promissory note to be the subject of sale must be an existing valid note in the hands of the payee, and given for some actual consideration, so that it can be enforced between the original parties; and if not valid in the hands of the payee, it cannot be rendered valid by a sale to a *bona fide* purchaser at a rate of interest exceeding the lawful rate. (*Sweet v. Chapman*, 7 Hun, 577; *Hall v. Wilson*, 16 Barb. 548; *Hall v. Earnest*, 36 id. 588; *Rapelye v. Anderson*, 4 Hill, 483; *Bossange v. Ross*, 29 Barb. 576; *Clark v. Sisson*, 22 N. Y. 316; *Cantlin v. Gunter*, 11 id. 368; *Eastman v. Shaw*, 65 id. 522, 527.) The fact that the plaintiffs having indorsed the note after it was sold, and after maturity paid Story & Co. the full amount thereof, does not render it, in their hands, a valid obligation. (*Hooper v. De Long*, 5 J. & S. 128.) If a referee or judge refuses on request to find a material fact, and an exception is taken, and such fact is conclusively proved, the refusal to so find is an error, which must inevitably lead to the reversal of the judgment. (*Smith v. G. F. Ins. Co.*, 62 N. Y. 87; *James v. Cowing*, 82 id. 449.) Where there are inconsistent or contradictory findings of a referee, those must be applied which are most favorable to the defeated party in aid of his exceptions. (*Bonnell v. Griswold*, 89 N. Y. 122; *Schroinger v. Raymond*, 83 id. 192; *Tomkins v. Lee*, 59 id.

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662.) The usual rule for the construction of pleadings applies as well to the answer of usury as to one setting up any other defense. (*Lewis v. Barton*, 106 N. Y. 70, 72; *Nat. Bank v. Lewis*, 75 id. 516.) The rule as to estoppel *in pais* clearly applies to the declarations of the plaintiff Davis as to the discounting of the note, and the variance caused by the plaintiff should not be allowed to prejudice the defense because a name and not a fact was pleaded in the answer. (*Voorhis v. Olmstead*, 66 N. Y. 113, 118; *C. Bk. v. Bk. of Comm.*, 50 id. 575.) The defendants were not estopped from pleading the defense of usury. (*Lewis v. Barton*, 106 N. Y. 70, 73.) The facts being in dispute, in the absence of a finding upon the subject, no presumption arises one way or the other. (*Walsh v. Princes*, 43 N. Y. 23; *Armstrong v. Du Bois*, 90 id. 95; *Hooper v. Ling*, 37 J. & S. 127-134.)

John Loughlin and *Alvin Burt* for respondents. The defendants were bound not only to set up any usurious contract in their answer, specifying its terms, the parties with whom it was made, and the particular facts relied upon to bring it within the prohibition of the statute, but to prove them substantially as alleged. (*Manning v. Tyler*, 21 N. Y. 567; *W. T. & C. Co. v. Kilderhouse*, 87 id. 435; *L. I. Bk. v. Boynton*, 105 id. 656; *Stillman v. Northrup*, 109 id. 473; *Nat. Bk. of Auburn v. Lewis*, 10 Hun, 468; *Hargar v. Worrall*, 69 N. Y. 370; *Sherwood v. Hauser*, 94 id. 626.) There was a sufficient valuable consideration to sustain the making or indorsing of the promissory note. (Story on Promissory Notes, chap. 5, § 186.)

PARKER, J. This action was brought to recover upon a promissory note for \$1,650, dated August 7, 1883, made by one Willett Bronson to the order of the defendant Ira E. Doying, and indorsed by him, and also indorsed by the defendant Thomas H. Beekman. The defense interposed by the defendants Doying and Beekman was usury. The referee to whom the case was referred to hear and determine reported in favor

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of the plaintiffs for the full amount claimed to be due. The findings of fact as made by the referee justified his refusal to find the conclusion of law, requested by the defendants, that the note was usurious, and demanded the conclusions of law as made in his report. We cannot review questions of fact. As to such questions the findings of the referee, affirmed by the General Term, are conclusive upon this court. (*Quincey v. White*, 63 N. Y. 370.) The appellant contends that some of the requests to find made by the defendants, and refused by the referee, were based upon uncontradicted testimony. That the findings of the referee in respect thereto were without evidence to support them, and that his exceptions thereto present questions of law, and are, therefore, reviewable here.

The refusals of the referee to find certain requests made by the defendants were, with the exception of the sixth and seventh requests, based upon either conflicting testimony or circumstances proven which tended to contradict the testimony of witnesses produced on the part of the defendants, and are, therefore, not reviewable. As to the sixth and seventh requests, we are unable to discover any evidence tending to contradict the testimony upon which those requests to find were based. Nevertheless, in order to make the exceptions taken thereto potent for a reversal of the judgment, it must appear that if the referee had found as requested the result would necessarily have been affected. (*Stewart v. Morss*, 79 N. Y. 629.)

The requests to be considered are as follows : Sixtn request. "That the defendant Beekman subsequently, and on or in the latter part of August, applied to William A. Davis to discount or procure to be discounted the said note, and the said Davis undertook and agreed to discount or procure the said note to be discounted at a discount of five per cent upon the face of said note." Seventh request. "That on or about the 31st day of August, 1883, in pursuance of said agreement to discount or procure to be discounted said note, said Davis procured the same to be discounted and delivered to the defendant Beekman the check of one Julius Fried for \$1,567.98 as the pro-

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ceeds of said note after deducting the said discount of five per cent on the face of said note."

The defendants in their answer allege, in substance, that William A. Davis procured the note to be discounted by one Julius Fried in pursuance of a corrupt and usurious agreement whereby the said Julius Fried, the party so discounting said note, received and charged interest at a greater rate than prescribed by law, to wit, at the rate of twenty per cent per annum for the loan and forbearance of the sum of money mentioned in the note.

Upon the trial it appeared that Fried did not discount the note. It does not appear that Davis discounted it, and the defendants did not request the referee to so find. The defendants failed to show by whom it was discounted, or that the person so discounting it charged interest therefor at a greater rate than prescribed by law. They contented themselves with the proof that one of the indorsers went to Davis, who had previously assisted in procuring discounts of paper made and indorsed by the same parties, and that he agreed to discount or procure the note to be discounted at a discount of five per cent upon the face of the note, and that Davis subsequently gave to such indorser a check of Julius Fried for the face of the note less five per cent. This proof justified the findings requested, but did not demand a finding that Davis discounted the note, or that a greater rate of interest than that allowed by law was charged and received by the person discounting it.

The defendants, by omitting to make requests to find in such respect, apparently recognized the fact that the evidence did not warrant such finding in their behalf. Indeed, the seventh request carefully recognizes the utmost extent to which defendant's proof goes in the direction of the defense interposed. By it the referee is requested to find that Davis procured the note to be discounted (not that he discounted it) "and delivered to the defendant Beekman the check of one Julius Fried for \$1,567.98, as the proceeds of said note, after deducting the said discount of five per cent."

It does not ask a finding that Fried discounted it, or that

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the discounting party only paid \$1,567.98 for the note, but, in effect, that all the defendants received from the party who conducted the negotiations for them, and at their request, was \$1,567.98. The statute against usury is, like other statutes, to be obeyed, but the rule is well settled that whoever desires its aid, through the interference of a court, must make out his title to relief by allegations and proof. (*Long Island Bk. v. Boynton*, 105 N. Y. 656.) The burden of proof was upon the defendants to show the usurious exaction by the party discounting the note. (*Condit v. Baldwin*, 21 N. Y. 219; *Estevez v. Purdy*, 66 id. 447; *Van Wyck v. Watters*, 81 id. 352.) That result was not accomplished by proof of payment of a sum of money exceeding the legal rate of interest to a party undertaking, for a consideration, to procure the note to be discounted.

Assuming the request to find, under consideration, as having been found, then from all the findings it is apparent that Davis did not discount the note. In that which he did, therefore, he necessarily represented either the defendants or the party discounting the note. If he acted as agent for the defendants, and it is fairly inferable that he did, the plaintiffs' rights cannot be affected, in any manner, by proof of transactions between the defendants and their agent. Even could it be held that in what he did Davis was the agent of the party discounting the note (the most favorable proposition for the defendants conceivable), still, under the rule laid down in *Stillman v. Northrup* (109 N. Y. 473), the defendants have failed to establish their defense, for it was incumbent upon the defendants to show that Davis, as the agent of the discounting party, took the bonus with the knowledge and assent of such party. In the opinion of EARL, J., it is said that "the burden of establishing such knowledge and acquiescence rested upon the defendants, and they were bound to sustain that burden by satisfactory evidence. The defense of usury, involving crime and forfeiture, cannot be established by mere surmise and conjecture, or by inferences entirely uncertain."

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It seems to be clear, therefore, that had the sixth and seventh findings of fact been found by the referee as requested, the conclusion of law, resulting from the facts found, must, of necessity, have been the same. It follows that such refusals to find do not constitute error justifying a reversal of the judgment.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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AUGUST WEIDNER, Respondent, *v.* TIMOTHY G. PHILLIPS,
Appellant.

In an action to recover damages for fraud in the sale or exchange of a lot of marble, the complaint alleged, and plaintiff's evidence tended to show, that he agreed to sell a hotel property for \$5,100 to defendant, who agreed to pay by assuming a mortgage of \$1,000 thereon, paying plaintiff \$1,100 in cash, and transferring to him a lot of marble which defendant represented to have cost him and to be of the market-value of \$8,000. It was further alleged that defendant colluded with one F. to appraise the marble at a fictitious value, and that F. did so. It was conceded on the trial that the actual cost and value of the marble did not exceed \$1,000. Defendant denied having made false statements as to the cost of the marble, and gave evidence which, if credited, would have justified a finding that both he and F. told plaintiff the marble cost between \$800 and \$1,000, and gave evidence tending to disprove that a fixed price was agreed upon in the exchange for the plaintiff's property. Defendant then offered to prove that at the time of the sale the hotel property was not worth \$5,100, or anything like that sum. This was excluded on plaintiff's objection, and defendant excepted. *Held*, error; that the fact as to the agreement being in dispute, the real value of plaintiff's property was an element for the jury to consider in determining which version was correct.

Weidner v. Phillips (39 Hun, 1), reversed.

(Submitted April 25, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

Opinion of the Court, per BROWN, J.

The nature of the action and the facts are sufficiently stated in the opinion.

W. S. Thrasher for appellant. The defendant made no statement or representation upon which an action could be predicated, unaided by other concurrent circumstances tending to prove fraud. (*Ellis v. Andrews*, 56 N. Y. 83; *Chrysler v. Canaday*, 90 id. 272; *Long v. Warren*, 68 id. 426.) To entitle the plaintiff to recover for false representations the representations as to an existing fact must have been untrue, and known to the defendant to be so, and must have been made with intent to deceive, and the plaintiff must have acted in reliance upon them under circumstances justifying such reliance. (*Babcock v. Libby*, 53 How. 255; 17 Hun, 131.) If the evidence is capable of an interpretation equally as consistent with innocence as with guilt, the former meaning must be given to it. (*Morris v. Talcott*, 96 N. Y. 100; *Warner v. W. T. Co.*, 5 Rob. 490.) The plaintiff must have been misled and deceived as to the value of this marble, without fault on his part, otherwise he cannot recover. (*Danning v. Bowe*, 16 Week. Dig. 119; *Schwab v. Elias*, 2 Civ. Pro. Rep. 340; *Townsend Mfg. Co. v. Foster*, 51 Barb. 347; *E. R. Bk. v. Hoyt*, 22 How. 478; *Hubbell v. Meigs*, 50 N. Y. 484.) The measure of damages was the difference between the amount actually paid and what he was fraudulently induced to believe it was worth. (*Miller v. Zeimer*, 17 Week. Dig. 391.)

M. T. Jenkins for respondent. Evidence as to plaintiff's conversation with Fisher as to the value of the marble was properly received. (*Tappin v. Powers*, 2 Hall, 272; *Cuyler v. McCartney*, 40 N. Y. 221; *Dewey v. Mayer*, 72 id. 70.) In any event, if it was error, the verdict of the jury could not have been affected by it, and should not be disturbed. (*Hobert v. Hobert*, 62 N. Y. 84; *Foot v. Becker*, 78 id. 158.)

BROWN, J. This action was brought to recover damages for fraud in the sale or exchange of a lot of marble.

The plaintiff was the owner of real estate at Cherry Creek,

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in Chautauqua county, upon which he carried on a hotel business. In the month of July, 1881, he sold this property to the defendant, and he alleged in his complaint, and claimed on the trial that, in the agreement for the sale, the price of the hotel property was fixed and agreed upon at the sum of \$5,100, which sum defendant agreed to pay by assuming a mortgage of \$1,000 on the property, and paying to plaintiff \$1,100 in cash, and transferring to him a lot of marble which defendant represented to have cost him and to be of the market-value of \$3,000. The fraud consisted in the false statements as to the cost and value of the marble. It was further alleged and claimed that defendant colluded with one Fisher to appraise the marble at a fictitious value, and that Fisher did appraise it at the sum of \$3,000. It appears to have been conceded upon the trial by all the parties that the actual cost and value of the marble did not exceed \$1,000.

Defendant denied the false statements as to the cost of the marble, and gave evidence which, if it had been credited by the jury, would have justified the finding that both he and Fisher told plaintiff that the cost and market-value of the marble was between eight hundred and one thousand dollars, and defendant denied, and gave evidence tending to disprove, that a fixed price was agreed upon in the exchange for the plaintiff's property.

Upon the trial the defendant offered to prove by a witness, Reynolds, that at the time of the sale the hotel property was not worth \$5,100 or anything like that sum. This evidence, upon plaintiff's objection, was excluded, and defendant excepted to the ruling of the court. We think the court erred in excluding this evidence, and for such error the judgment must be reversed. No objection was made to the form of the offer to make the proof. The objection was to the testimony. The foundation of the plaintiff's claim was that the price of the hotel was fixed in the agreement to exchange at \$5,100, and that this sum was to be paid by defendant by the assumption of the mortgage upon the property of \$1,000, the payment of \$1,100 in money, and the transfer of the marble. His testi-

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mony, as to the transaction, is as follows: He (defendant) says, "How much do you ask for your property?" I told him, "I had made up my mind that this property was worth \$5,100." He said "All right." I said to him, "And you say you have got \$3,000 worth of marble?" He says "Yes, that is what I have got." I said to him, "And I don't want your marble and allow you any more than the marble cost you at the quarry, and what it cost you to bring it here;" he said "Yes; that is all I calculate to get for it." I said to him, "Then if you have got \$3,000 worth of marble, I shall want \$2,100 to boot, but if you have not got that amount, I shall want more, for I don't want to let my property go less than \$5,100; I would not take any less if you paid me the money;" he said "All right." Again, he testified: Phillips said, "I think you have got that property of yours a little too high, you ought to call it just an even \$5,000;" I told him "I would not do that; that if he did not want to allow me what we agreed on at my house, I would go home and we would say no more about it; he said \$100 hadn't ought to split us; I told him it would split us unless he traded as we talked it over at my house;" he said, "Let's split the difference and call it \$5,050;" I told him that there was no use of talking, that I would not trade any different than what was talked of at my house; he said, "All right, if you don't want to trade any other way I will call it a bargain."

This conversation was denied by defendant, and he denied that any sum was fixed or agreed upon as the selling-price or consideration for the hotel property. Upon the issue thus presented to the jury we think evidence as to the value of the hotel property was admissible. The parties might, of course, in their agreement fix upon any sum as the value of the property, but when the fact as to the agreement was in dispute the real value was an element for the jury to consider in determining which version of the story was the correct one.

The price of \$5,100 fitted exactly the transaction as told by the plaintiff. The assumption of the mortgage on the land, the payment of \$1,100 in cash, and the transfer of the

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marble at a valuation of \$3,000, made up the exact consideration, and plaintiff's evidence thus appeared consistent with the facts of the transaction.

If it had been proven that the real value of the hotel instead of being \$5,100 had been only \$3,000, it would have tended to corroborate the defendant's version of the transaction and give color to his statement, that the marble instead of being put into the trade at \$3,000 was taken at its actual cost of about \$1,000. Otherwise, the plaintiff would have appeared to be receiving in the trade \$2,000 in excess of the value of his property, and if the jury had believed that fact, it would have destroyed all inference of false and fraudulent statements which plaintiff's evidence tended to establish against the defendant, and which the jury appeared to have believed.

We think this evidence was admissible, and that its value was for the consideration of the jury, and we cannot say that, had it been admitted, it might not have led to a different result. Its rejection was fatal to the judgment, which should be reversed and a new trial granted, with costs to abide the event.

All concur, except BRADLEY and HAIGHT JJ., not sitting.
Judgment reversed.

114 462
123 128 MARY WIEDMER, Respondent, v. THE NEW YORK ELEVATED RAILROAD COMPANY, Appellant.

In an action to recover damages for injuries alleged to have been received by plaintiff through defendant's negligence, plaintiff's evidence tended to show that a hot coal, not as large as a pin head, from an engine on defendant's elevated road, fell into her eye, but there was no direct evidence that the locomotive from which it came was defective in design, construction, condition or operation, or that it was not supplied with the best known appliances for arresting sparks and cinders; nor was there evidence that defendant knew or had any means of identifying the locomotive complained of. It did not appear that more than one coal came from the engine on this occasion, or that coals were emitted from any of its locomotives on other occasions. It was claimed that, in the absence of explanatory evidence by defendant, proof of the falling of the coal was sufficient to authorize the jury to infer that the defendant

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negligently used a locomotive improperly designed, defectively constructed, out of repair or negligently operated. *Held*, untenable; and that the evidence did not authorize a verdict for the plaintiff; that defendant was not bound to assume the burden of showing the condition of all of its locomotives in use on that part of its line during the afternoon in question.

Ruppel v. Manhattan R. Co. (13 Daly, 11); *Burke v. Manhattan R. Co.* (Id. 76); *McNaier v. Manhattan R. Co.* (46 Hun, 502; 4 N. Y. Suppl. 810) distinguished.

Wiedmer v. N. Y. El. R. R. Co. (41 Hun, 284) reversed.

(Argued April 25, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term or the Supreme Court in the first judicial department, entered upon an order made May 13, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and reversed an order setting aside the verdict and granting a new trial.

This action was brought to recover damages or injuries alleged to have been caused by defendant's negligence.

The following facts appeared on trial:

In the afternoon of August 18, 1879, as the plaintiff was walking north on the east sidewalk of Third avenue, in the city of New York, between One Hundred and Twenty-sixth and One Hundred and Twenty-seventh streets, a hard substance entered and injured her right eye. At this time the defendant operated an elevated railroad in this avenue by locomotives which were propelled by the power of steam. The plaintiff alleged in her complaint that the substance which entered her eye was a hot coal, and that it fell from a passing locomotive, by reason of defendant's neglect to furnish it with proper appliances to prevent the emission of sparks and burning coals; and by reason of the negligent manner in which the defendant, at the time, operated the locomotive. The defendant admitted that it was a corporation engaged in operating an elevated railroad by the power of steam in Third avenue and other streets, but denied all of the other allegations in the complaint.

The plaintiff testified: "Q. On the afternoon of August 18, 1879, did you take a walk with your two children? A. Yes,

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sir. Q. Walking along the sidewalk towards Harlem Bridge? A. Yes, sir. Q. State to the jury what happened? A. I went towards One Hundred and Twenty-seventh street, and a spark of fire flew from the engine into my eye; a piece of hard coal fell upon my eye. Q. Which eye was it? A. The right eye; I suffered so much during the whole night that in the morning I went down to Weber's drug store; I asked him if he could see anything in my eye—that a coal fell from the elevated road, and he took a little brush and put it in my eye and brushed out a piece of coal, because I got pain from the eye; I suffered all the time. Q. How large a piece of coal was it? A. Not quite as large as a pin-head. Q. Was it burning coal? A. Yes, sir. Q. How soon after this piece of coal flew in your eye did you call upon Mr. Weber? A. On Monday morning about seven o'clock. * * * Q. Where did it happen that the piece of coal from defendant's engine flew into your eye? A. Near One Hundred and Twenty-seventh street, on the right hand side. Q. What did Mr. Weber do to the eye? A. He took a little brush and brushed the piece of coal out. * * * Cross-examined by defendant's counsel: Q. You did not go to Mr. Weber the same day that the injury occurred? A. No, sir. Q. Was the eye painful as soon as the cinder went into it? A. Yes, sir; it pained all the time like as if there was fire in it. Q. And that is the reason that you think it was a burning cinder? A. Yes, sir. Q. You did not see the cinder burning? A. Fire flew down and a piece of hard coal fire flew in my eye. Q. You bathed it all night in cold water? A. Yes, sir. Q. Did you see the cinder come from the engine? A. I saw fire come down, and a piece came into my eye. Q. You do not positively know that it came from the road? A. Yes, sir. Q. Did you see it come all the way down? A. I saw that the fire flew from the elevated, and a piece flew into my eye. Q. I should think you would have turned your eye away when you saw it coming, or turned your head; did you not think of that; did not that occur to you, to turn your eye away? A. No, sir. Q. You saw the cinder coming all the way from

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the train? A. Yes, sir. Q. Until it reached you? A. Yes, sir. Q. When you saw it coming why did you not turn away your eye? A. It came so quick. Q. I understand you to say that you saw it come all the way from the train to your eye? A. The fire flew down, and the piece flew into my eye. Q. Did you see it start from the engine? A. I saw the fire that flew down, and as soon as it got down I had it in my eye. Q. You saw something coming in the air that struck your eye? A. Fire flew from the engine, and I got a piece of it in my eye. Q. You saw it all the way from the engine? A. Yes, sir; it flew so quick, and it flew in my eye so quick."

The foregoing is all of the evidence tending to establish the defendant's liability; and after giving evidence bearing upon the question of damages the plaintiff rested. The defendant offered no evidence, and moved to dismiss the complaint upon the ground that the plaintiff had not established a cause of action. The motion was denied and the defendant excepted. The defendant then asked the court to direct a verdict for the defendant upon the same ground, which was denied, and an exception taken.

Further facts appear in the opinion.

Edward S. Rapallo for appellant. The escape of cinders from defendant's locomotives is not negligence *per se*; it does not raise a presumption of negligent use and operation, and it furnishes no basis from which negligence can be inferred. (*Sheldon v. H. R. R. Co.*, 14 N. Y. 218; *Rood v. N. Y. & E. R. R. Co.*, 18 Barb. 80; *Fero v. B., etc., R. R. Co.*, 22 N. Y. 209; *Field v. N. Y. C. & H. R. R. Co.*, 32 id. 350; *Collins v. N. Y. C. & H. R. R. Co.*, 5 Hun, 503; *McCaig v. E. R. Co.*, 8 id. 599; *Searles v. M. R. Co.*, 101 N. Y. 661; *Taylor v. City of Yonkers*, 105 id. 209; *Kaveny v. City of Troy*, 108 id. 577.)

Charles Steckler for respondent. The engine from which the sparks or cinders came was wholly under the control and management of the defendant, its agents and servants, and

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therefore, the mere occurrence of the accident is sufficient *prima facie* proof of negligence to impose on the defendant the onus of rebutting it. (*Case v. N. C. R. R. Co.*, 59 Barb. 644; *Curtis v. R. & S. R. R. Co.*, 18 N. Y. 534; *Giles v. D. S. I. Co.*, 6 Cent. Rep. 867; *Hayes v. Muller*, 70 N. Y. 112; *Searles v. M. R. Co.*, 5 N. E. Rep. 66; *Lowery v. M. R. R. Co.*, 99 N. Y. 160; *Collins v. N. Y. C. R. R. Co.*, 5 Hun, 503; *Faro v. B. & S. Co.*, 22 N. Y. 209-212; *Baxter v. S. A. R. R. Co.*, 30 How. Pr., 219; *Jetter v. N. Y. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458.) To justify a nonsuit on the ground of plaintiff's contributory negligence such negligence must appear so clearly that no construction of the evidence or inference from the facts would have warranted a contrary conclusion. (*Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 464; *Wendell v. N. Y. C. & H. R. R. R. Co.*, 91 id. 420; *Thurber v. H. B. M. & F. R. R. Co.*, 60 id. 326; *Munroe v. T. A. R. R. Co.*, 5 Super. Ct. [J. & S.] 114; *Sutton v. N. Y. C. R. R. Co.*, 66 N. Y. 279; *Spaulding v. Jarvis*, 32 Hun, 621; *Vanderwald v. Olsen*, 1 N. Y. State Rep. 506; *Clark v. L. E., etc., R. R. Co.*, 40 Hun, 605; *Baxter v. S. A. R. R. Co.*, 30 How. Pr. 219.) If there is any evidence, however slight, tending to prove the plaintiff's cause of action, it is not within the power of the court to dismiss the complaint or order a nonsuit. (*Colt v. S. A. R. R. Co.*, 49 N. Y. 671; *People v. M. T. Co.*, 11 Abb. N. C. 304.) There was nothing in the testimony to show that the plaintiff did not, after she saw the spark coming down, conduct herself, in respect thereto, as any ordinary, careful, prudent person, under similar circumstances, would have done. (*Kellogg v. N. Y. C., etc., R. R. Co.*, 79 N. Y. 76; *Salter v. U., etc., R. R. Co.*, 88 id. 42; *Newson v. N. Y. C. R. R. Co.*, 29 id. 383; *Ernst v. H. R. R. R. Co.*, 35 id. 9; *Harpell v. Curtis*, 1 E. D. Smith, 78.) The necessity for the employment of medical services was the natural consequence of the defendant's negligence, and the reasonable compensation for such services is recoverable by the plaintiff as a part of her damages. (*De Wint v. Wettsie*, 9 Wend. 325; *Bennett*

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v. *Lockwood*, 20 id. 222; *Albert v. B. S. R. R. Co.*, 2 Daly, 389; *Shile v. Brokhause*, 8 N. Y. 614; *Mailler v. E. P. Line*, 61 id. 312; *Hoffman v. N. F. Co.*, 68 id. 385; *Brignoli v. C. & G. E. R. Co.*, 4 Daly, 182; *Metcalf v. Baker*, 57 N. Y. 662; *Ehr Gott v. Mayor, etc.*, 96 id. 264; *Simonson v. N. Y., L. E. & W. R. R. Co.*, 36 Hun, 214; *Masterson v. Village of Mt. Vernon*, 58 N. Y. 391.) As there was no denial of the facts proved by the plaintiff, and no testimony given on the part of the defendant that the engine used by it at the time of the accident, causing injury to the plaintiff's eye, was supplied with all the best known appliances for arresting the emission of sparks and cinders or that the engine from which the spark or cinder causing the injury was emitted was in good order and repair, the court would have been justified, upon request, to have directed a verdict for the plaintiff. (*Calligan v. Scott*, 58 N. Y. 670; *Strong N. Y. L. M. Co.*, 6 Hun, 528.) The court correctly refused to charge that "the facts of the escape of a cinder, and the consequent injury to the plaintiff, are not, in themselves alone, any evidence of negligence on the part of the defendant." (*McNailer v. M. R. R. Co.*, 46 Hun, 502.) The injury inflicted upon the plaintiff could not very well be anticipated by her, and, therefore, upon authority, she was not guilty of contributory negligence. (*Aaron v. S. A. R. R. Co.*, 2 Daly, 127; *Baxter v. S. A. R. R. Co.*, 3 Robt. 510; *Davenport v. Ruckman*, 37 N. Y. 568.) A railroad running through a populous city, or where the danger from lighted sparks or burning coals are imminent, is bound to the utmost vigilance and care. (*Fero v. B. & S. L. R. R. Co.*, 22 N. Y. 209; *Field v. N. Y. C. R. R. Co.*, 32 id. 339; *Webb v. R., W. & O. R. R. Co.*, 3 Lans. 453; 49 N. Y. 420.) The question of defendant's negligence was properly submitted to the jury. (*Webb v. R., W. & O. R. R. Co.*, 49 N. Y. 420; *Bedell v. L. I. R. R. Co.*, 44 id. 367; *Field v. C. R. R. Co.*, 32 id. 339.)

FOLLETT, Ch. J. Each party to this action was rightfully in this street and engaged in a lawful pursuit. No contractual

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relations existed between them, and neither owed the other any duty not due to all persons lawfully using the street. There is no direct evidence that the locomotive from which the coal came was defective in design, construction, condition or operation, or that it was not supplied with the best known appliances for arresting sparks and cinders. It does not appear that more than this one coal came from the locomotive on this occasion, or that sparks or coals were emitted from it, or from any of defendant's locomotives on other occasions. There is no evidence that on this occasion the employes in charge of defendant's train did an act which ought not to have been done, or omitted to do an act which ought to have been done.

The counsel for the plaintiff contends that the evidence is sufficient, in the absence of explanatory evidence in behalf of the defendant, to authorize the jury to infer, from the falling of this coal, that the defendant negligently used a locomotive improperly designed, defectively constructed, out of repair or negligently operated. The evidence discloses an isolated colorless fact, the emission of a coal smaller than a pin head, and the rule, *res ipsa loquitur*, has not been extended far enough to authorize the inference, from this fact, that the defendant was guilty of actionable negligence. It is urged that the rule that the burden is upon the party averring negligence to affirmatively establish it, should not be given its usual force or signification in this case, because it is said that the defendant could more easily have proved the condition of the locomotive than the plaintiff. The plaintiff did not, by her complaint or evidence, inform the defendant from which train the coal fell, in which direction the train was going, the hour of the accident or of any facts by which the defendant could have learned which locomotive emitted the coal; and, in the absence of the slightest evidence that the defendant knew or had the means of identifying the locomotive complained of, or that there were appliances in general use by which the emission of sparks of the size of the one which entered the plaintiff's eye might have been prevented, we think the fact that the defendant did not voluntarily assume the burden of showing the condition of

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all of its locomotives in use on that part of its line, during the afternoon of August 18, 1879, should not have been allowed to weigh with the jury. The evidence of negligence in the case at bar falls far short of that given in *Ruppel v. Manhattan Railway Company* (13 Daly, 11); *Burke v. Manhattan Railway Company* (13 id. 75); or in *McNaier v. Manhattan Railway Company* (46 Hun, 502; 4 N. Y. Suppl. 310).

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur, except POTTER and BRADLEY, JJ., dissenting.

Judgment reversed.

EDWIN SAWYER, Respondent, v. RANSOM B. DEAN,
Appellant.

Defendant contracted to purchase of F., plaintiff's assignor, five hundred hides of a quality specified, to be selected by the vendor, shipped from Chicago and delivered to defendant at Owego, upon payment of draft for the purchase-price. F. shipped the hides by one of the usual railroad routes to Owego to his own order, accompanied by a draft, with directions to deliver on payment of the draft. The hides arrived in due time and in good order, and notice thereof was given to defendant, but he refused to receive and pay for them unless he had an opportunity of taking them to his factory and there opening and examining them. Plaintiff offered to allow an examination at the railroad station, upon a platform or in the car, and notified defendant that, unless accepted in accordance with the contract, the hides would be returned to the seller at Chicago and there sold and defendant charged with the difference between the contract and selling-price, together with freight and expenses, and, upon defendant's refusal of the offer, the hides were reshipped and sold in accordance with the notice. In an action to recover damages for alleged breach of the contract, held, that the seller had the right, by shipping in his own name, to retain possession of the hides until accepted and paid for; that, having made F. his agent to select, defendant was bound the selection, and was not entitled to an examination before acceptance; that, conceding he had a right to examine the hides, the opportunity offered for so doing was just and reasonable, and he was not entitled to have them delivered into his possession for that purpose; that plaintiff was entitled, on refusal to accept, to recall the hides and sell

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them at Chicago pursuant to the notice; and that the difference between the contract and selling-price, with the expenses, was the proper measure of damages.

(Argued April 25, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 20, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

The nature of the action and the material facts are stated in the opinion.

Charles A. Clark for appellant. Defendant had a right to stand upon the terms of the contract, and was not bound unless the condition upon which his obligations depended was fulfilled. (*G. N. Bk. v. Taaks*, 101 N. Y. 442, 449.) In every contract between parties where the performance by one of them presupposes some act to be done by the other, prior thereto or contemporaneously, the neglect or refusal to perform such act dispenses with the obligation. (*Cross v. Beard*, 26 N. Y. 85-88; *Starbird v. Barron*, 38 id. 237; *Hills v. Lynch*, 3 Robt. 42.) A party who is the cause or occasion of a breach cannot recover thereon. (*Winch v. T. M. B. I. Co.*, 86 N. Y. 618.) The fact that Franklin Sawyer shipped a carload of hides, by his own carrier, consigned to himself, directed to Owego, N. Y., retained the possession of them and denied the defendant the right to receive or examine them, was not executing any contract on the part of Sawyer, or any contract even that had been proposed by Sawyer to the defendant. (*Hills v. Lynch*, 3 Robt. 42; *Cayuga County Nat. Bk. v. Daniels*, 47 N. Y. 631.) Until there was an actual acceptance there could be no valid sale of the hides. No title passed. (*Stone v. Browning*, 68 N. Y. 598; *Caulkins v. Hellman*, 47 id. 449; *Cornell v. Clark*, 104 id. 451.) The court admitted improper evidence of local customs of hide dealers in Chicago, a custom unknown to the defendant, and not in accord with the alleged contract, upon

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which proof of customs so improperly admitted is based the decision of the court below. (*Wheeler v. Newbould*, 16 N. Y. 392; *Hill v. Blake*, 97 id. 216; *Mead v. Smith*, 3 N. Y. C. P. Rep. 171; *Walls v. Bailey*, 49 N. Y. 473, 474; *Higgins v. Moore*, 34 id. 425. *Markham v. Jaudon*, 4 id. 535; Parsons on Contracts, 544.) Where a usage sought to be proved is of a particular trade or locality, it must appear that it was known to a party before he is bound. (*Walls v. Bailey*, 49 N. Y. 473, 474; *Higgins v. Moore*, 34 id. 425; *Security Bk. v. Nat. Bk.*, 67 id. 463; *Groat v. Gile*, 51 id. 439; *Bk. of Commerce v. Bissell*, 72 id. 615; *Oelricks v. Ford*, 64 U. S. 534; 23 How. 49, 65; *Rawson v. Holland*, 59 N. Y. 611, 619. The statement of an agent cannot be received to prove his agency, so as to bind his principal. (*Howard v. Norton*, 65 Barb. 161; *Baird v. Gillett*, 47 N. Y. 186; *Osgood v. Manhattan Company*, 3 Cow. 612; *Williams v. Fitch*, 18 N. Y. 546; *Foote v. Flanagan*, 79 id. 224.) Where evidence bearing with directness and force upon the question at issue has been erroneously admitted by a referee, a new trial must be granted, although there may be unobjectionable evidence sufficient to sustain his conclusion. (*Osgood v. Man. Co.*, 3 Cow. 612; *Williams v. Fitch*, 18 N. Y. 546-552; *Baird v. Gillett*, 47 id. 186; *Erben v. Lorillard*, 19 id. 299; *Starbird v. Barrons*, 43 id. 200.) Facts are required to be alleged truly in the pleadings. (*Cook v. Barr*, 44 N. Y. 158.) The defendant had the right to prove anything concerning the statements or admissions of the plaintiff, whether such statements or admissions are contained in his complaint or elsewhere. (*Baird v. Daly*, 68 N. Y. 547-550.) If evidence is proper in kind, though not in degree, or if objectionable otherwise upon some technical ground, all right of exception to it is waived by the parties by not objecting in time, and all rightful control over it by the court gone (*Hall v. Earnest*, 36 Barb. 585, 591; *Quinn v. Lloyd*, 41 N. Y. 349, 355; *Filkins v. Baker*, 6 Lans. 516, 519; *Sherman v. Scott*, 27 Hun, 336.) The channel through which hearsay evidence comes does not change its nature; it continues hearsay evidence and

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inadmissible, though repeated by a party to the suit as mere hearsay. (*Stephens v. Vroman*, 16 N. Y. 381; *McMaster v. Smith*, 3 N. Y. State Rep. 481.) Parties go to court to try the issues made by the pleadings, and courts have no right impromptu to make new issues for them on the trial. (*Wright v. Delafield*, 25 N. Y. 266, 270; *Ballou v. Parsons*, 11 Hun, 602, 605; *Brown v. Leigh*, 49 N. Y. 81; *N. Co. Nat. Bk. v. Lord*, 33 Hun, 557, 566; *Dezen-gremel v. Dezen-gremel*, 24 id. 457.) An agent employed to sell cannot make himself the purchaser, nor, if employed to purchase, can he be himself the seller. (*Conkey v. Bond*, 34 Barb. 276, 286, 287; 36 N. Y. 427; *N. Y. C. Ins. Co. v. N. P. Ins. Co.*, 14 id. 91; *U. Ins. Co. v. T. Ins. Co.*, 17 Barb. 132; *Taussig v. Hart*, 58 N. Y. 425-428.) There was no valid written agreement for the sale, purchase or shipping of the hides previous to the time they were shipped, November 4, 1882. (2 R. S. [Banks' 6th ed.] 136, § 3; 3 R. S. 142, § 3; *Shindley v. Houston*, 1 N. Y. 261.) The shipping of hides by a carrier, selected by Franklin Sawyer himself, was not a delivery of the hides to the defendant. (*C. Co. Nat. Bk. v. Daniels*, 47 N. Y. 631, 637.) They were not shipped upon or in accordance with any writing or order of the defendant, and the defendant had the right to refuse to accept them. (*Rawson v. Holland*, 59 N. Y. 611; *Hills v. Lynch*, 3 Robt. 42; *Brand v. Focht*, 1 Abb. Ct. App. Dec. 185; *Stone v. Browning*, 68 N. Y. 598; *Hill v. Blake*, 97 id. 598; *Schindler v. Houston*, 1 Comst. 261.) Sawyer had not only by his acts rendered it impossible for the defendant to receive the hides and perform any alleged contract, and by his own violations of the understanding released the defendant, but, in addition to his acts, had abandoned it by his language in his communications to defendant. (*Graves v. White*, 87 N. Y. 466; Code of Civil Pro., § 993; *James v. Cowing*, 82 N. Y. 449, 459.) The testimony of a witness, which is merely controverted and not otherwise impeached, cannot ordinarily be entirely disregarded as utterly false. (*Moran v. McLarty*, 75 N. Y. 25; *Lomer v. Meeker*, 25 id. 361, 363.) If two concur

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rent acts are stipulated as delivery by the one party and payment by the other, no action can be maintained by either without showing a performance, or what is equivalent to a performance of his part of the agreement. (2 Kent's Com. 465; *Caulkins v. Hellman*, 47 N. Y. 449; *Mead v. Smith*, 3 N. Y. Civ. Pro. Rep. 171; *Sickles v. Flanigan*, 79 N. Y. 224.) In such a case the question of law is as to which party is entitled to judgment, and if the court below erroneously decides this question, an exception to such a ruling brings up for review the question whether the successful party was, upon all of the facts, entitled to judgment. (*Hemingway v. Poucher*, 98 N. Y. 281-287; *Wilson v. Allen*, 3 How. Pr. 369-373; *Pratt v. Foute*, 9 N. Y. 463; *Moores v. Townshend*, 102 id. 387-392.)

William P. Cantwell for respondent. The defendant cannot question the validity of the assignment from Franklin Sawyer to the plaintiff. (*Sheridan v. Mayor, etc.*, 68 N. Y. 38.) The fact that Franklin Sawyer did business in the name of Franklin Sawyer & Co. does not affect this action. (*Wood v. E. R. Co.*, 72 N. Y. 196. Franklin Sawyer, in accordance with the custom of the hide trade of Chicago, had the right to ship the hides to his own order, and to require payment before delivery, and it was competent for the plaintiff to prove such custom. (*Miller v. Insurance Co. of North America*, 1 Abb. N. C. 470; *Spear v. Hart*, 3 Robt. 420; *Walls v. Bailey*, 49 N. Y. 464; *Hinton v. Locke*, 5 Hill, 439; *N. Y. C. & H. R. R. Co. v. S. O. Co.*, 87 N. Y. 486, 492.) Where a vendor has brought property to the place of delivery, he may then insist on payment before he parts with the possession. (*Vincent v. Conklin*, 1 E. D. Smith, 203; *Clarkson v. Carter*, 3 Cow. 84; *Morey v. Medbury*, 10 Hun, 540; *Haden v. Demits*, 53 N. Y. 426, 431; *Higgins v. Murray*, 4 Hun, 568; *Commercial Bank v. Pfeiffer*, 22 id, 334.) Upon the refusal of the defendant to accept and pay for the hides, Franklin Sawyer proceeded

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regularly in notifying the defendant that, in consequence of such refusal, said hides would be taken to Chicago and sold for and on defendant's account, for the best price that could be obtained therefor and in the subsequent sale of the said hides. (*Dustan v. McAndrews*, 44 N. Y. 72, 74, 79; *Mills v. Gould*, 10 J. & S. 123; *Lewis v. Greider*, 49 Barb. 606; 51 N. Y. 236, 237; *Pollen v. Leroy*, 30 id. 549, 556, 557; *McGibbon v. Schlissinger*, 18 Hun, 225, 226; *Crooks v. Moore*, 1 Sandf. 297.) The expenses of sale are a proper item of damages. (*Pollen v. Leroy*, 30 N. Y. 550, 555, 556.) Sale need not be at auction. (*Crooks v. Moore*, 1 Sandf. 297.) Even where improper evidence is admitted, it is no ground for reversal if the facts are proved by uncontroverted evidence. (*S. P. Co. v. Marheimer*, 41 N. Y. Supr. Ct. 184; *Sutherland v. N. Y. C. & H. R. R. Co.*, 41 id. 17; *Milliner v. Luce*, 3 Hun, 496; *Erwin v. N. S. Co.*, 8 W. D. 382; *Crooks v. Mali*, 11 Barb., 205; *Pepper v. Haight*, 20 id. 429; *Snell v. Snell*, 3 Abb. 430; *Smith v. Floyd*, 18 Barb. 522; *Colwell v. Lawrence*, 38 id. 642; 38 N. Y. 71; *Hofheimer v. Campbell*, 7 Lans. 157; 59 N. Y. 269.) One who proposes an unreasonable number of additional findings will not be heard to object that the court did not discern the materiality of some of them. (*Quincey v. Young*, 53 N. Y. 504; *Andrews v. Raymond*, 58 id. 686; 2 Y. & C. 661; *Davis v. Leopold*, 87 N. Y. 620; *Potter v. Carpenter*, 71 id. 74; *E. P. Co. v. Lacey*, 3 Hun, 111; 63 N. Y. 422; *Scott v. Pilkington*, 15 Abb. 280.) The questions of fact having been fully determined by the trial court, and the judgment of that court affirmed by the General Term, no further inquiry as to these facts will now be permitted. (Code of Civ. Pro. § 1337; *Hynes v. McDermott*, 91 N. Y. 451; *People v. French*, 92 id. 306.)

POTTER, J. The action is brought to recover damages alleged to have been sustained by Franklin Sawyer, assignor of the plaintiff, in consequence of the neglect and refusal of the defendant to accept and pay for a car load of five hundred

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hides that he had ordered and purchased of said assignor and directed to be shipped from Chicago, where said Franklin Sawyer resided, and where the hides were, to Owego, in the state of New York, where the defendant had a tannery in which he was conducting, on a more or less extensive scale, the business of tanning hides into leather. The bargain for the hides was made through correspondence, by letter and by telegraph communications between the parties.

After the arrival of the hides at Owego, and some correspondence by telegrams and by letter, and the sending an agent by the plaintiff to Owego to see the defendant, and after an interview with the gentleman so sent by the plaintiff with defendant's agent at Owego, the defendant finally refused to receive the hides unless he had an opportunity of taking them from the depot to his factory and there opening and examining, if not testing and proving them. This the plaintiff refused to allow the defendant to do, and gave him notice, at the proper time and manner, that unless he accepted the hides in accordance with the contract, and especially if he refused after the offer which had been made to examine the hides at the railroad station upon a platform or in the car, that the hides would be returned to the seller in Chicago, on account of the refusal to receive and pay for the same, and would there be sold at the best price that could be obtained for them, and defendant would be charged with the difference between the price brought on the sale at Chicago and the price agreed upon, together with the necessary expenses growing out of sending the hides to and return from Owego and other incidental expenses occasioned by the refusal of the defendant to receive and pay for them in accordance with the contract.

This action is brought to recover that difference and those expenses; that is, the difference between the contract-price and the price at which they were sold at Chicago, and this recovery is based upon that difference in the price and these expenses.

This correspondence by telegram and by letter commenced on or about the 20th day of October, 1882, and was carried on

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for a few days and culminated, as the trial court found, in an agreement to purchase, on the part of defendant, the five hundred hides, specifying the price per pound and quality of the hides, and that, in pursuance of such contract and purchase, the plaintiff's assignor shipped the hides on the fourth of November to his own order, accompanied by a draft on the defendant sent through a bank at Owego, the hides to be delivered to the defendant upon payment of the draft, and the carrier, the railroad company, was directed to deliver them accordingly.

When the hides arrived at Owego, on or about the 11th of November, 1882, notice was given to the agent or person in charge of the defendant's tannery, that they had arrived. And at this point the question in controversy arises, whether the defendant was bound, under the contract made between him and plaintiff's assignor, to take the hides and pay the draft without any examination or inspection of them, or whether, under the contract, he was entitled to an inspection of the hides before accepting the draft or paying the draft or acceptance of the hides. There had been nothing said in these negotiations or correspondence between the parties until after the hides were shipped on the fourth of November, as before stated, in respect to the time or manner of payment for the hides. The trial court found that this contract was consummated, and found the contract, by a modification or waiver, resulted in giving to the defendant the right that he claimed, namely, to an examination of the hides before an acceptance of them or accepting the draft and paying it. The court should (I think, from the evidence) have found the correspondence between the plaintiff's assignor and the defendant, commencing with the letter of inquiry on the twentieth of October, and the actual shipment on November fourth, that the defendant ordered of plaintiff's assignor five hundred hides, the quality of which was specified in the correspondence at prices named per pound for the hides, and the same were to be selected by plaintiff's assignor for the defendant; and the plaintiff's assignor did ship the hides, accordingly, in his own name;

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and the same were received at the railroad station near defendant's tannery in good order and in due time. The law arising upon such finding is that the defendant had no right to test or prove the hides, and was not entitled to the possession of them for that or any other purpose until they were paid for. Upon the ordinary agreement to sell and to purchase personal property, in the absence of any agreement or provision in the agreement as to the time or manner of payment, delivery and payment are simultaneous acts, and, as a tender, is equivalent in law to performance; a tender of delivery or payment by one person to the other gives the person making the tender the right to enforce the performance of the contract against the other. (*Hayden v. Demets*, 53 N. Y. 426, 428, 429.) In the case under consideration defendant made no objection that the hides were not of good quality or of the quality specified in the terms of purchase or in the number of hides. He simply insisted that he had a right under the contract to an examination of the hides before acceptance and payment. Under such a contract, as I think, the trial judge might have well found, from the evidence in this case, it results as in the case of *Higgins v. Murray* (4 Hun, 565); and, as was in the opinion in that case expressed by Judge DANIELS, the plaintiff by shipping in his own name was simply keeping the possession of the property, as he had the right to do, until it had been accepted and paid for by the defendant. By shipping in that manner he retained and kept the lien of possession as his security for the payment of the property.

The effect of the contract was to transfer the title of the property from plaintiff's assignor to the defendant, subject only to the right of the assignor to retain possession until payment should be made as long as no credit was to be given or had been provided for by the terms of the agreement. After the making of the contract he became the agent of the defendant, save in retaining possession of the property as security for the payment of the purchase-money while title to the property was vested in the defendant. To the same effect

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is the case of *Commercial Bank v. Pfeiffer* (22 Hun, 327); also the case of *Morey v. Medbury* (10 Hun, 540). If the law in this case is not as above stated, the effect would be that a person who, under a valid contract, has sold his property, sent it to a distant place to the manufacturing establishment of the purchaser, has received no payment and has parted with the possession of the property, and that means of securing payment, must rely upon the responsibility of the purchaser and his disposition to pay for the property. If this is not satisfactory to the purchaser, he should have made a different bargain. He could have done as he was advised by the plaintiff's assignor, viz., have appointed a hide broker or expert to have made the selection. Then both the buyer and the seller would have been bound by the selection made, the buyer to accept and pay for and the seller to deliver. But the defendant chose to make the seller his agent to select, and he must abide by the selection made for him. Especially in the absence of any evidence that the hides were not just what he ordered. Indeed, the defendant did not base his refusal to pay upon any allegation, much less than upon any proof that the hides were not in accordance with his specification and order, but upon the simple pretext that he wanted to examine them, and that, too, after he had authorized the plaintiff's assignor to select the hides for him.

While the trial court might, and I think should have, found as above indicated, it has found substantially in that way, but with the qualification that the plaintiff's assignor gave the defendant the right to examine the hides before accepting them. This right the learned trial court bases upon expressions in the letters of October twenty-seventh and November fourth, and which I think were subsequent to the correspondence which constitutes the contract between the parties. The examination referred to in those letters is not to be an examination which should determine whether the defendant should receive these five hundred hides, but the examination of this lot was to determine whether he was so well suited with this lot that he would make further and larger orders. Besides, it

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seems very plain that the plaintiff's assignor did not mean to change the terms of the contract for this shipment, but, at all times and upon the stand as a witness upon the trial, insisted that the defendant was not entitled, as a matter of right, to an examination before an acceptance of the hides. There was no consideration for such change of contract or waiver, as it is called by the trial court, and it, therefore, imposed no new or different obligation upon the plaintiff than existed under the former contract. But the trial court made a finding that the contract was so modified as to allow the defendant an examination before acceptance. The trial court also found that plaintiff's assignor had offered to defendant an opportunity to examine the hides outside of the car in which they were contained upon the platform or in the store-house; that such opportunity was a just and reasonable one, and that defendant refused, and thus defendant broke the contract, and that the plaintiff's assignor was justified in the course he pursued thereafter.

I can see no error in this finding or conclusion. It would afford a fair and reasonable opportunity for the defendant to determine the quality of the hides. None could be better for the purpose of an examination unless they should be taken to defendant's tannery and there be worked as well as examined. Of course, business of this kind could not be practically or successfully carried on in this way. Certainly not to the vendor of hides living hundreds if not thousands of miles away, and receiving many, if not the most, of the hides he sells from dealers and butchers living and carrying on business as many more miles from the plaintiff's assignor.

We come now to notice the exceptions taken by the defendant. These were, first, as to the proof of a custom, existing in Chicago, for the seller of hides to ship and consign to himself at the place of destination, with directions to the carrier to deliver to the vendee upon his accepting a draft for the purchase-price. We do not think that the proof of such custom could have harmed or prejudiced the defendant in any way. Whether the contract was to accept the hides and sign a draft

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for payment upon notice of their arrival by the carrier, or to do so after reasonable opportunity to examine the hides and refusal by the vendor to avail himself of such opportunity, can make no difference with the legal rights and obligations of the parties to the contract. It was the clear right of the seller, when no other mode or time for payment is provided in the contract, to retain possession of his property until he was paid for it. The defendant has no right or ground for complaint that the plaintiff insists upon such right. The defendant in this case ordered hides to be sent to Owego. Hides, such as he wanted and had ordered, were brought and tendered to him at the railroad station at Owego, one of the usual routes and points of shipment. No other route or point had been indicated by the defendant when the hides were shipped.

We do not perceive that the defendant's rights have been interfered with, or what just ground of complaint or of refusal to accept the goods the defendant would have had if the goods had arrived in the personal care or possession of the seller and without any bill of lading or shipping bill whatsoever. The seller has the right to retain his possession until he received or is tendered payment of the price. This mode of doing business is entirely legitimate, and in many cases it is the only way of securing payment. (*Commercial Bk. v. Pfeiffer, supra*; 22 Hun, 334.)

It certainly would not seem to be any just ground of complaint, upon the part of the defendant, that the plaintiff instead of delivering the goods to the vendee at Chicago by an absolute consignment to him, as he was authorized to have done under the contract in question, took the risk upon himself of the payment of the transportation and of their arrival in good order and condition at the place where the defendant desired to use and manufacture them into leather. (*Higgins v. Murray, supra*.)

Our conclusion is that this proof of custom did not change or affect the legal relations of the parties to the contract in question, and was not at all necessary or serviceable in the decision of the question in this case. Whether this proof of

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custom was in or out of the case, the decision must have been the same, and so the defendant has no just ground of complaint, or for another trial without such proof.*

* * * * *

I do not understand from the defendant's points that any serious contention is made as to the right of the plaintiff to recall the hides and resell them at Chicago, the great hide market of the country, and after notice to the defendant that that course would be pursued if the defendant refused to accept and pay for the hides in accordance with the terms of the contract. The plaintiff in the contingency just stated had the right to pursue this course.

I think the sale was properly made by the plaintiff at Chicago, and that he adopted the best means to get the highest price and occasion defendant the least loss, and that the sale, etc., was conducted in entire good faith by the plaintiff's assignor, and that the amount of the recovery did not exceed the plaintiff's right or the defendant's obligation after he had broken the contract. (*Duston v. McAndrew*, 44 N. Y. 72, 74, 79.)

We think the judgment should be affirmed, with costs.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

HENRY H. SEYMOUR, Respondent, *v.* MATTHIAS SMITH et al.,
Appellants.

In an action upon an undertaking, given on appeal from a judgment, brought by plaintiff as assignee of the judgment, the defense was that S., plaintiff's assignor, obtained the judgment as trustee of an express trust, for R., and that L., the judgment-debtor, had paid the judgment to R., who acknowledged satisfaction thereof. The assignment of the judgment to plaintiff was executed and recorded prior to the alleged payment and satisfaction. Neither the defendants nor R. had notice of the assign-

* The omitted portion of the opinion discusses exceptions to the reception of evidence which are not deemed of any general interest or importance.

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ment at the time of payment other than that given by the assignment record. *Held*, that the defense was not available; that, as S. brought the action, wherein the undertaking was given, in his own name, not as agent, the question as to his right to recover was an issuable fact, and was necessarily determined in that action, and defendants were concluded by their agreement to pay the judgment, if it was affirmed, from again bringing into question any issuable facts so determined; that, conceding the judgment recovered by S. was for the benefit of R., S. was the legal owner, and although, had the settlement been effected with the latter while S. was such legal owner, he would have been bound by it, yet he had the power to sell and transfer the judgment, and having done so, R.'s interest therein ceased and plaintiff, the assignee, became the legal and equitable owner, and his rights as such were not affected by the payment to R.

The rule protecting a judgment-debtor who has paid the judgment to the former owner after an assignment thereof, when he has had no notice of the assignment, does not extend to one claiming to be the beneficial owner; it only applies to those having the legal title.

To make a payment to one, not the legal owner, effectual, the duty devolves upon the payor of showing that the person to whom payment was made had, at the time, a right to receive payment.

(Argued April 26, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Superior Court of Buffalo, entered upon an order made October 4, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

The nature of the action and the facts are sufficiently stated in the opinion.

Willis J. Benedict for appellants. Reed was the real party in interest, the absolute and exclusive owner, and, as such, could have sued in his own name or in the name of his agent. (Code, § 449; 6 How. Pr. 471-474; 13 Kan. 567; 2 Sandf. 708; Calvert on Parties, 218.) Where a bond or judgment is assigned in trust, the donee in trust takes only an equitable title, and the legal title remains for the benefit of the assignor. (Hill on Trustees, 367.) The court having found that no notice of any assignment was ever given defendants or their attorneys, and that recording the said assignment was not notice, the debtor, Lynch, had a right to settle with the original owner. (14 Abb. [N. S.] 69; 61 N. Y. 119.)

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Henry H. Seymour for respondent, in person. The debtor is only protected from claims of the assignee in cases where he has paid directly to the assignor. (Freeman on Judgments, § 426.) An agent has a lien on the property or funds of his principal for moneys advanced or liabilities in his behalf. (55 N. Y. 325-341.) The lien does not depend upon the character of the property, and is equally valid in respect to negotiable bills in actual possession or chattels. (55 N. Y. 341.) Agents and principals do not, as such, have any mutual or successive relationship to rights of property. They are not in privity with each other. (Freeman on Judgments, § 164.) An assignee of a debt secured by an undertaking can sustain an action on the undertaking where the condition on which it was given has been forfeited, although the undertaking was to pay the assignor without adding "his assigns." (*Snodgrass v. Krenkle*, 49 How. 122; *Seuring v. Berry*, 58 Iowa, 20.) When confidence has been reposed in an agent and an apparent authority conferred, the principal must suffer as against third parties from an actual exercise of authority not exceeding the appearance of that which is granted. (*Armour v. M. C. R. Co.*, 65 N. Y. 111; 73 id. 5.) Notice of an attorney's lien for his compensation, under section 66 of the Code, as amended in 1879, need not be given to protect his lien against a settlement by the parties. (*Coster v. G. F. Co.*, 5 N. Y. C. P. Rep. [Browne], 146; 98 N. Y. 660.)

HAIGHT, J. This action was brought upon an undertaking executed by the defendants to enable one Patrick Lynch to appeal to the General Term of the Supreme Court from a judgment entered against him in favor of one Daniel Sourwine.

It appears that Daniel Sourwine obtained a judgment in the Supreme Court for \$577.47 against one Patrick Lynch, from which an appeal was taken to the General Term; that upon such appeal the defendants executed an undertaking, conditioned that if the judgment appealed from, or any part thereof was affirmed, or the appeal dismissed, that they would pay the sum recovered or directed to be paid by the judg-

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ment, or the part thereof as to which it was affirmed. Thereafter the judgment was affirmed by the General Term of the Supreme Court, and a judgment of that court was duly entered. An execution was thereupon issued upon such judgment to the sheriff of the proper county, and the same was returned unsatisfied. The plaintiff, as the assignee of such judgment, brought this action against the defendants as sureties upon such undertaking for the purpose of recovering the amount of that judgment.

The defense is that Sourwine obtained the judgment as the trustee of an express trust for one Charles M. Reed, executor, and that Lynch had paid Reed, as executor, the amount of the judgment. The question is presented as to whether this defense is available in this action. The undisputed facts are, in substance, as follows: Sourwine was the agent of Charles M. Reed, executor, having charge of his real estate in the city of Buffalo; that, as such agent, he leased certain premises to Lynch. It was understood that the New York, Lackawanna & Western Railroad contemplated taking the property so leased for railroad purposes. Thereupon Lynch executed and delivered to Sourwine a paper, in and by which, for value received, he promised to pay Sourwine one-half of any damages received by him for the canceling of his lease. Subsequently the railroad company did institute proceedings to condemn the property, and in such proceedings Lynch was awarded the sum of \$1,000 as damages for the taking of his leasehold interest in the premises. It was for the recovery of one-half of that sum that the judgment was obtained on which the undertaking on appeal was given.

Subsequent to the recovery of the judgment, and on or about the 11th day of March, 1884, the judgment was, for a valuable consideration, duly assigned by Sourwine to the plaintiff; and such assignment was, on the 21st day of November, 1884, duly recorded in the office of the clerk of Erie county, that being the county in which the judgment-roll was filed. Thereafter, and on the 22d day of July, 1885, Charles M. Reed, executor, acknowledged satisfaction of the

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judgment so recovered by Sourwine. At the time of the payment of the judgment to him neither of the defendants or Lynch had notice of the assignment of the judgment to Seymour, other than that given by the recording of the assignment. Under these circumstances, it does not appear to us that the defendants are in a position to avail themselves of the defense interposed.

The agreement, as we have seen, was to pay Sourwine one-half of the damages received. The action to recover that amount was brought by Sourwine in his individual name, and not as agent. The question as to whether he was entitled to recover was one necessarily determined in that action. The defendants had notice of his recovery at the time they executed the undertaking, for the fact was recited in that instrument. The condition was that they were to pay the amount of the judgment if it was affirmed or the appeal dismissed. Therefore, upon the affirmance of the judgment, they were concluded, by their agreement to pay, from again bringing in question any issuable fact that was necessarily determined by the judgment which they had agreed to pay. (*Hill v. Burke*, 62 N. Y. 111-117; *Methodist Churches of New York v. Barker*, 18 id. 463; Freeman on Judgments, § 176.) Consequently the trial court, in this action, committed no error in holding that Sourwine had the legal title to the judgment at the time of its recovery.

Whilst the defendants, as sureties upon the undertaking, are bound by the record and facts necessarily determined by the judgment, which they agreed to pay, they are doubtless at liberty to put in issue, in this action, any question that was not necessarily determined in that action. They may show subsequent payment, and we are inclined to the opinion that they may also show that the judgment recovered by Sourwine was for the benefit of another; for that fact was not necessarily at issue in the former action. Sourwine, as the trustee of an express trust, could maintain the action without joining with him the person for whose benefit the action was prosecuted; and the contract, being in his name for the benefit of another, constituted him a trustee of an express trust. (Code

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of Civil Pro. § 449.) Sourwine must, therefore, be treated as the legal owner of the judgment at the time of its recovery, but as holding such legal title for the benefit of Reed, as executor of the Reed estate, for whom Sourwine was agent. And, had the settlement been effected by the defendant with Reed during the time that Sourwine was such legal owner, he would doubtless have been bound by the settlement so made. But Sourwine, as the legal owner of the judgment and agent of Reed, had the power to sell and transfer the judgment for the benefit of Reed, and it appears that this was done more than a year before the settlement was made. Seymour, as attorney, had prosecuted the former action under an arrangement with Sourwine that he should have for his services one-half of the recovery, upon the affirmance of the General Term. He paid Sourwine the other half of the judgment and took an assignment thereof, which, as we have seen, was recorded in the office of the clerk of the proper county. It is contended that the plaintiff was not a purchaser in good faith, for the reason that he knew of Reed's interest in the judgment. This may be, but he also knew that Sourwine was the agent of Reed, and had the legal title of the judgment and the power to sell and transfer it. There is no suggestion of any collusion between him and Sourwine or of any disposition or intention on the part of Sourwine to convert the money derived from the transfer of the judgment to his own use. The evidence in reference to his agreement as to compensation for prosecuting the former action and his evidence in reference to the amount paid for the assignment of the judgment was competent for the purpose of showing that he paid full value and was a purchaser in good faith. It consequently appears that, upon the assignment of the judgment to Seymour, he became the legal and equitable owner thereof, and Reed's interest therein ceased and determined. So that, at the time the settlement was made with Reed on behalf of the defendants, he had no interest in the judgment, equitable or otherwise. It is contended, however, that the defendants had no actual notice of the assignment of the judgment to

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Seymour, and that, consequently, they are protected in the settlement made. But the rule which they invoke does not extend to persons claiming to be beneficial owners. It only extends to those having the legal title. (*Brewster v. Carnes*, 103 N. Y. 556; *Trustees of Union College v. Wheeler*, 61 id. 88; *Bishop v. Garcia*, 14 Abb. [N. S.] 69.) Had payment been made to Sourwine in good faith, without notice of his assignment to Seymour, a different question would have been presented. But, when the defendants attempted to settle with some one other than the legal owner, in order to have the same effectual, the duty devolves upon them of showing that the person with whom the settlement was made at the time had the right to receive the payment and make the settlement. This they had failed to do; for it appears that at the time the settlement was made neither Reed nor his agent, Sourwine, had any interest in the judgment, legal or otherwise.

The judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

**THOMAS H. WILSON, Respondent, v. THE KINGS COUNTY
ELEVATED RAILROAD COMPANY, Appellant.**

Plaintiff, who was an expert in railroad building, at the request of S., who assumed to be defendant's chief engineer, and, under an arrangement between him, S. and two attorneys, who assumed to act as defendant's counsel, to the effect that plaintiff should have the contract for building defendant's road, devoted his time for about nine months and expended moneys for traveling expenses, for plans and specifications and other necessary expenses, preparatory to making the contract and doing the work. Plaintiff made and submitted to one of the attorneys his proposal to construct and equip the road. A proposed contract was drawn up, but plaintiff was informed by one of the attorneys it was deemed advisable to have the contract made by defendant with one D., and by the latter assigned to plaintiff, to which the latter assented. Up to this time S. and the attorneys had not been formally employed by defendant,

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although their names appeared as holding the positions designated in a printed circular containing the names of the officers and directors of the company, and they were apparently treated as such officers. At a meeting of its board of directors thereafter, S. was appointed engineer, and the firm, in which one of said attorneys was a partner, was appointed as attorneys and counsel. At the same meeting a statement was made by a committee, to whom the matter had been submitted, setting forth, in substance, the negotiations with plaintiff, the proposed contract with D., and transfer thereof to plaintiff, drafts of which were submitted. The board assented to and approved the same, and agreed that, upon execution of the proposed agreement between plaintiff and D., the former should be accepted and recognized as fully subrogated to the rights and substituted as to the liabilities of D. under his contract, and defendant's officers were authorized to execute the contract on its part. Plaintiff was, however, without fault on his part, denied the contract, although able and willing to perform it. In an action to recover for plaintiff's services and expenses, *held*, that, by the action of defendant's board of directors the negotiations with plaintiff might be deemed to have been recognized, and, in some sense, treated as having been made on behalf of defendant; that plaintiff had a right to assume that the persons with whom he negotiated legitimately represented defendant; that this, together with the fact that the moneys expended, were for the benefit of defendant, justified a finding of an agreement between plaintiff and defendant that he should have the contract and that the services were rendered and expenses incurred at the request of defendant, and that such findings were sufficient to sustain a recovery. Where evidence is received, the competency of which depends upon further evidence, upon the assurance of the party offering it that such further evidence will be supplied, in case of failure so to do the remedy is by motion to strike out the evidence received; in the absence of such a motion no question is presented for review upon appeal.

Plaintiff was permitted to put in evidence a book of memoranda made by him; this was objected to generally. *Held*, that as the memoranda might have been made competent by plaintiff's testimony verifying the entries as original and correct, and showing he was unable to recollect the items independent of the memoranda, the general objection was not well taken.

(Argued April 26, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 1, 1886, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to recover for moneys expended

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and services rendered by plaintiff at the alleged request of defendant, and for its use and benefit.

The facts, so far as material, are stated in the opinion.

P. Mitchell and *A. J. Skinner* for appellant. The building of the road was the extraordinary business of the company, and any authority in respect to the making of the contract therefor must be specially conferred. (*Adriance v. Roome*, 52 Barb. 399; *Angell* on Corp. § 298; *W. R. R. Co. v. Boyne*, 11 Hun, 171; *Dabney v. Stevens*, 40 How. 341.) A person holding the relation merely of attorney or counsel to the corporation, or that of chief engineer, could not bind the company by promises, or engagements in respect to matters outside the scope of his authority. (*People's Bk. v. St. A. R. C. Church*, 39 Hun, 500; *Woodruff v. R. & P. R. R. Co.*, 108 N. Y. 39; *Homersham v. W. W. W. Co.*, 6 Exch. 137; *Thayer v. V. C. R. R. Co.*, 24 Vt. 440; *Vanderwerker v. V. C. R. R. Co.*, 27 id. 125, 130; *Herrick v. Belknap*, Id. 673; *Redfield* on Railroads [5th ed.] 431, 433.) The transaction between plaintiff and Lowrey, according to plaintiff's version, for the payment by plaintiff for the plans and specifications to be prepared by Sellers & Co., was substantially a borrowing transaction, and plaintiff cannot recover from the defendant company the money so advanced. (*Bickford v. Menier et al.*, 107 N. Y. 490; *Tucker v. Woolsey*, 64 Barb. 142.) Plaintiff knew that Lowrey was only the attorney and counsel of the defendant, and he was chargeable with notice and knowledge of the scope of his authority. (*De Bost v. A. P. Co.*, 1 How. Pr. [N. S.] 501; *N. R. Bk. v. Aymar*, 3 Hill, 262; *Alexander v. Cauldwell*, 83 N. Y. 480; *Adriance v. Roome*, 52 Barb. 399, 411; *Martin v. Farnsworth*, 49 N. Y. 555.) Officers of a corporation are special, not general, agents. (*Adriance v. Roome*, 52 Barb. 399, 411; *Martin v. Furnsworth*, 49 N. Y. 555; *Grant* on Corp. 55; *Angell & Ames* on Corp. 249; *Thurman v. W. F. Co.*, 18 Barb. 500.) The principal is not bound by the acts of a special agent beyond his author-

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ity, and corporations are not bound by acts of agents or officers outside the scope of their authority. (*Martin v. Farnsworth*, 49 N. Y. 555; *Munn v. Commission Co.*, 15 Johns. 44; *Beals v. Allen*, 18 id. 363; *De Bost v. A. P. Co.*, 1 How. Pr. [N. S.] 501; *Marine Bk. v. Clements*, 3 Bosw. 600; *Rossiter v. Rossiter*, 8 Wend. 494; *Craighead v. Peterson*, 72 N. Y. 279; *Alexander v. Cauldwell*, 83 id. 480.) And even if some benefit was voluntarily conferred on the corporation by plaintiff, that fact could not create any liability as against the corporation. (*Woodruff v. Roch. & Pitts. R. R. Co.*, 108 N. Y. 46, 47.)

James M. Townsend, Jr., for respondent. Assuming that neither Lowrey, Shea, Davison, Serrell, Gillmore, nor all of them together, had authority to bind the defendant, the fact that plaintiff's money and services were used for the corporate purposes for which they were furnished makes the defendant liable. (*Scott v. M. R. R. Co.*, 86 N. Y. 200; *Wild v. Mining Co.*, 59 id. 644; *Peterson v. Mayor, etc.*, 17 id. 449; *A. N. Bk. v. City of Albany*, 92 id. 363; *Booth v. F. and M. Bk.*, 50 id. 400, 401; *People's Bk. v. M. Nat. Bk.*, 101 U. S. 181.) The use of plaintiff's money and services by the defendant was an unqualified ratification. (*Murray v. Bininger*, 3 Keyes, 107; *Phillips v. Campbell*, 43 N. Y. 271; *Castle v. Lewis*, 78 id. 134, 135; *Bissel v. R. Co.*, 22 id. 264-267; *Parish v. Wheeler*, Id. 504; *Kent v. Mining Co.*, 78 id. 180; *Ang. & Ames on Corp* § 304.) As plaintiff, in pursuance of defendant's promise to give him a contract to build its road, performed the acts of service and expended his money, this constituted a valid and binding agreement to give him the contract. (*Marie v. Garrison*, 83 N. Y. 26; *Willets v. Sun Ins. Co.*, 45 id. 48; *White v. Baxter*, 71 id. 254; *L'Amoreux v. Gould*, 7 id. 349; *Anson on Cont.* 13, 84.) It will be presumed, in the absence of proof to the contrary, that the money was used for the purposes for which it was advanced and received, and the defendant will be assumed to have had the benefit of the services and money, and must pay for what it has had. (*Beers v.*

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Phænix Co., 14 Barb. 358; Ang. & Ames on Corp. § 297.) The admission of the memorandum book, being harmless in every possible view, constitutes no ground for reversing the judgment. (*Vandevoort v. Gould*, 36 N. Y. 614.)

BRADLEY, J. The defendant was organized as a corporation about the year 1879, and its purpose was to construct and operate an elevated railroad in the city of Brooklyn. The plaintiff in June, 1882, contemplated taking a contract for the construction of the road, and, with that view, thence-forward until in March, 1883, devoted his time and attention to the matter, and advanced and expended some money in that behalf preparatory to making of such contract and to the performance of the work of construction. He, having finally failed to obtain the contract, brought this action to recover the amount of money advanced and expended, and compensation for his services so rendered by him in contemplation of having the contract and the opportunity to perform it. The main question on the merits is, whether there was any agreement made with the plaintiff, by the defendant or by persons having authority to represent it in doing so, that he should be employed to do the work of construction of the road, and whether the plaintiff's services and money were bestowed and expended at the request of the defendant. The referee found those facts with the plaintiff, and that his services were rendered and the money paid out and expended by him in reliance upon such agreement of the defendant, and that on March 15, 1883, the plaintiff, without his fault, was duly notified to do and pay nothing further on account of the defendant, and the contract, which the defendant undertook to make with the plaintiff, was not made. The contention of the defendant's counsel is, that those findings of the referee had no support in the evidence. The defendant's purposes could be manifested only through agencies duly authorized or having apparent authority to represent it; and persons dealing with the officers of a corporation, or with persons assuming to represent it, are chargeable with notice of the purpose of its creation and its powers and with the

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authority, actual or apparent, of its officers or agents with whom they deal; and when they seek to charge the corporation with liability upon a contract made apparently in its behalf, the burden is upon them to prove the authority of the person assuming to act as such officer or agent to so make it. (*Adriance v. Roome*, 52 Barb. 399; *Alexander v. Cauldwel*, 83 N. Y. 480; *Woodruff v. Rochester & P. R. R. Co.*, 108 id. 39.)

The question of authority was evidently one of some difficulty upon the evidence, but since the referee has found the requisite facts to support the conclusions of law, all reasonably permissible intensions will on this review, be allowed to sustain, so far as they may, his conclusions of fact. There is no direct proof of any pre-existing authority to represent the defendant in the persons with whom the plaintiff negotiated in the outset, or upon whose request he performed the services or advanced the money for the purposes of such negotiation or request; and whatever there is to support such authority rests in circumstances and future events, and in the inferences derivable from them. The attention of the plaintiff was first called to the subject of becoming contractor for the work by Mr. Serrell, who assumed to be the chief engineer of the defendant, and by whom the plaintiff was introduced to Mr. Lowrey, of the firm of Macfarland, Reynolds & Lowrey, who were said to be defendant's counsel, and with Serrell and Lowrey, and more especially with the latter, the plaintiff's negotiations were had. And in respect to making with the plaintiff the contract for the performance of the work, Judge SHEA, also assuming to represent the defendant, took an active part. A proposed contract between the defendant and plaintiff, was in July, 1882, drawn by Lowrey and submitted by him to the plaintiff. It was not executed. The plaintiff was soon after informed by Judge SHEA that for certain reasons it was advisable that the defendant's contract for the construction of the road be made with Henry J. Davison, and that the plaintiff should become the assignee of the contract, or sub-contractor, in such manner as to be subrogated to the rights of Davison

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under the contract, to which the plaintiff assented. Upon that subject, to the same effect, some correspondence was had between Davison and the plaintiff, and between the latter and Lowrey. The plaintiff had in the meantime made in writing, and submitted to Lowrey, his proposal to construct and equip the road. At a meeting of the board of directors of the defendant, held September 13, 1882, a statement was made, on behalf of the committee, to whom the matter was submitted at a meeting of May, 1881, that the negotiations which had been conducted for many months had resulted in an arrangement, by which it was expected that the work might be commenced; that there was in contemplation a contract with Davison, who proposed to make with the plaintiff an agreement, the draft of which, with that proposed between the company and Davison, was submitted to the board, and after having considered them the board declared its approval of the latter, and, subject to the production of the certificate thereafter mentioned of Judge SHEA, the board assented to and approved the proposed agreement between Davison and the plaintiff, and agreed that upon its execution he should be accepted, recognized and dealt with by the company as fully subrogated to the rights and substituted as to all the liabilities of Davison under the contract of the latter, and that such contract should become operative when Judge SHEA should deliver to the secretary of the company his certificate or opinion to the effect that the agreement was in order and should be executed by the company, and that the officers were thereupon authorized and instructed to execute the agreement and affix to it the corporate seal of the defendant. At the same meeting Mr. Serrell was appointed engineer, and Macfarland, Reynolds and Lowrey, attorneys and counsel for the company, upon terms mentioned in the resolution. And on the day following Mr. Lowrey forwarded to the plaintiff a copy of the portion of the resolution relating to the contracts of Davison with the company and himself. There does not appear to have been any formal appointment of engineer and counsel for the company until done by those resolutions; but the persons therein named as

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such were before then so designated as engineer and counsel in a printed circular, which purported to also contain the names of the officers and directors of the company, and they were apparently so treated. By those resolutions the negotiations with the plaintiff in relation to the contract for the work may be deemed to have been recognized and in some sense treated as having been had with him in behalf of the company, and they bear somewhat upon the authority of Serrell, Lowrey and Shea to represent the company upon the subject of such negotiations and those matters incidental to it. It may also be inferred, from what then occurred, that the plaintiff was justified in supposing that he would become the contractor for the work, and that what he did was in contemplation that such relation would be consummated. It may, from what appears, be assumed that plans and drawings of the proposed road were essential preparatory to the commencement of the work, and perhaps for an estimate of it. In the unexecuted contract, drawn in July, Mr. Serrell was referred to as the engineer who should prepare them, and in the contract submitted to the board of directors in September, 1882, reference was also made to the plans, profiles, specifications, etc., of the company's engineer and his assistants. In view of their preparation the plaintiff advanced money to the engineer, Serrell, to enable him to make the drawings, etc., and he finally being unable to satisfactorily prepare them, a Philadelphia party, competent to do it, was employed and paid by the plaintiff for that purpose. They were made by that party, and having been submitted to the inspection of the president of the company, were by him approved. The expenses incurred for the preparation of the plans, drawings, etc., including the payment made to Serrell for that purpose, constituted a considerable portion of the plaintiff's claim allowed by the referee.

This disbursement, the evidence on the part of the plaintiff tends to prove, was made with the knowledge and consent of the engineer and Lowrey, and at the request of the latter, assuming to represent the defendant. And the same may be

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said of the services and other expenses of the plaintiff. While the authority of Lowrey, as counsel, did not enable him to incur the liability of the defendant to the plaintiff for such disbursements, services and expenses, there was something in the action of the board in September, in view of what he had done, which tended to recognize him as the representative of the company for some purposes connected with the negotiation with the plaintiff; and this was a fact which may properly have been considered by the referee in relation to subsequent events. It was through Lowrey that the arrangement, so far as it had progressed, was made with plaintiff, which produced the proposed contract submitted to the board of directors. He drew those contracts; the resolutions through him were submitted to the plaintiff, and he thereafter assumed to continue to represent the company so far as related to the means employed preparatory to contracting the work. The plaintiff seems to have been a practical man in the business of constructing railroads. Such experience was essential to the preparation for the work. It may be observed that the only immediate object of the company was the construction of its road. This was the first thing to be done, and whatever was essentially preparatory to that result was within its apparent design and purpose. The president did not, nor did the directors, personally appear to give it much attention. The secretary, so far as appears, did nothing beyond his duties as such. The active men were the engineer and Lowrey, of the attorneys and counsel for the company. Judge SHEA, it seems, represented largely the stockholders. He was also somewhat active, and of him the president of the defendant testified: "Judge SHEA was acting as counsel for the company; I understand he was acting in that capacity; he had general charge of the negotiations and arrangements to be made during the whole term of my presidency, I should say." The inference was warranted that those three parties, the engineer, the counsel and the judge, were acting in harmony and with a view to doing what was requisite to produce the construction of the road. This was apparently the object, and it was with the view to that end that the

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plaintiff's services and disbursements for which recovery was directed by the referee were rendered and made by him. Although it may not be easy of satisfactory demonstration in a brief space, we think the circumstances already referred to, and others appearing in the record, permitted the conclusion that the plaintiff had the right to assume that the persons before mentioned, with whom he negotiated and dealt in the matter, legitimately represented the defendant in that respect, and that they were acting within the authority apparently recognized by the company. The difficulty in reaching this conclusion would have been materially increased if the action and resolutions of the board of directors of September, 1882, had not been put in evidence; and the fact that the money advanced by the plaintiff was for the benefit of the defendant, and in the line of business essential to the leading purpose of its organization, is a circumstance properly for consideration in its relation to other facts bearing upon the situation. (*Peterson v. Mayor, etc.*, 17 N. Y. 449; *Wild v. N. Y. & A. S. Mining Co.*, 59 id. 644; *Scott v. Middletown, etc., R. R. Co.*, 86 id. 200.) This view is deductible only from the evidence the most favorable to the plaintiff. And however difficult it may appear to have been upon the evidence, as a whole, to satisfactorily reach the conclusion of the referee, it is sufficient, for the purposes of this review, that there was some evidence to support every fact essential to the result. It was also an important fact that the plaintiff was ready and able to take and perform the contemplated contract, and that it was denied him without causes chargeable to any fault on his part. The fact was so found upon conflicting evidence in that respect.

It is contended that there was no support for the allowance to the plaintiff for his services and expenses during the period mentioned. The referee found on that subject that, in pursuance of such employment before mentioned, the plaintiff, at the request of the defendant, devoted his entire time and services, from June 7, 1882, to March 15, 1883, to the interests of the defendant; that his services were reasonably worth at the rate of \$5,000 per annum; and that he necessarily paid

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out and expended in traveling and hotel expenses, for the services of his employes and other necessary disbursements, \$3,260.65, and that the services were rendered and the moneys paid out and expended upon the agreement (before mentioned in the referee's report) and in reliance by the plaintiff thereon. The facts that the plaintiff so devoted his entire time and services during such period, that they were of such value, and that he incurred such expenses and made such disbursements in the matter mentioned, were supported by the evidence, as was also the fact that he did it in reliance upon the understanding referred to. And those findings of fact are entitled to the same consideration as those before mentioned. In that view, when the plaintiff was denied the contract upon the faith of which he had proceeded, the referee, upon the facts as found by him, was justified in awarding to the plaintiff such compensation for services and such reimbursement for moneys so expended in that behalf for the benefit of the defendant. These views lead to the conclusion that none of the findings of fact, by the referee, were entirely without the support of evidence. And, therefore, neither of the exceptions to them is well taken.

There were several exceptions taken by the defendant's counsel to the reception of evidence, the competency of which was dependent upon further evidence. And upon the assurance of the plaintiff's counsel that it would be supplied, the evidence was received conditionally. The question was one of order of proof, and if there was a failure of further proof to give to any of it connection requisite to its legitimate effect as evidence, it properly may have been made the subject of a motion to strike out. No such motion appears to have been made, and it cannot be assumed on this review that evidence (if there was any such) so received, not rendered competent, was finally considered by the referee upon the merits. (*First Unitarian Society v. Faulkner*, 91 U. S. 415; *Place v. Minster*, 65 N. Y. 89; *Bayliss v. Cockcroft*, 81 id. 363.) The same may be said of the evidence of Mr. Francis.

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at the time it was received. He represented the Philadelphia party who prepared the plans, etc., of the road. The interview between him and the plaintiff had relation to an estimate of the work desired of his principal, and to drawings required and made of the proposed road. There was a small portion of his evidence not, apparently, within the purpose of the ruling upon the general objection, and which, very likely, may have been excluded upon a specific objection to it. But as it was not so taken nor any motion made to strike out, there was no exception presenting error in that particular respect.

The plaintiff was permitted to put in evidence his book of memoranda made by him, to which the defendant took a general objection and exception. This did not appear to be competent evidence. But as it was not set out in the record we are not advised of its contents or whether they were of such character that the defendant could have been prejudiced by the evidence. There is a further reason why the general objection is not available for the predication of error upon the ruling. The plaintiff's memoranda may have been rendered competent by his evidence verifying the entries as original and correct, and showing that he was unable to recollect the items independently of the memoranda. (*Guy v. Mead*, 22 N. Y. 462; *Howard v. McDonough*, 77 id. 592; *Peck v. Valentine*, 94 id. 569.) And, as it may be that the specific objection could have been obviated, the general objection was not well taken. (*Fountain v. Pettee*, 38 N. Y. 184; *Bergmann v. Jones*, 94 id. 51.)

After a careful examination of the record, the conclusion is that there was no error to the prejudice of the defendant in any of the rulings of the referee to which exception was taken.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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WILLIAM C. RANDALL, Respondent, *v.* FRANK RANDALL,
Appellant.

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The trial by jury of any questions of fact in issue in an equity action is within the discretion of the trial court. (Code of Civil Pro. § 971.) It may adopt or disregard the finding of the jury, or set aside the verdict and grant a new trial, at its discretion.

An order, therefore, setting aside the verdict and granting a new trial in such case is not appealable to this court. (§§ 190, 1847, sub. 2.)

It seems that if the action were triable, as matter of right by a jury, as the motion for a new trial involves questions of fact which may or could have been considered by the General Term, its order would not be reviewable here.

(Argued May 2, 1889; decided June 4, 1889.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made November 17, 1884, which affirmed an order of Special Term setting aside a verdict, and granting a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

G. H. Beckwith for appellant. The order is appealable to this court. (Code, §§ 190, 191.)

William P. Cantwell for respondent. The duty of granting or refusing a new trial, under section 999 of the Code, being one resting largely in the discretion of the judge presiding, his decision is not reviewable here and the appeal should be dismissed. (*McKeever v. Weyer*, 11 Week. Dig. 258; *Pharis v. Gere*, 107 N. Y. 231, 233; *Kennicutt v. Parmalee*, 15 N. Y. S. R. 515.)

BRADLEY, J. The action is equitable in character, and was brought to obtain a dissolution of partnership alleged to exist between the parties and for an accounting. The defendant, by his answer, alleged that he had sold his interest in the firm property to the plaintiff for the sum of \$500 in settlement of all partnership matters, of which sum he was paid by the

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latter \$200, and demanded judgment for the balance, \$300 and interest. The plaintiff, by his reply, put such alleged claim in issue, and the questions of fact, whether the defendant did make such sale to the plaintiff, and the latter agreed to pay such sum, and did pay thereon \$200, etc., were submitted to the jury, and, upon a conflict of evidence, they found in the affirmative upon such questions of fact. This was in favor of the defendant. And on the plaintiff's motion, made on the minutes, the verdict was set aside and a new trial granted. That order being affirmed by the General Term the defendant appealed to this court. The trial by jury of the questions of fact, or any of them within the issues, was wholly matter of discretion of the court (Code of Civil Pro. § 971), and the practice in that respect, although differing in form, is, in practical effect, substantially the same as that which formerly prevailed of awarding feigned issues and taking verdicts upon them. As then it was done in aid of the chancellor and to inform his conscience upon questions of fact, so now the purpose, as applicable to the court, is the same. (*Vermilyea v. Palmer*, 52 N. Y. 471; *Acker v. Leland*, 109 id. 5.) The court below might adopt or disregard the finding of the jury, or set aside the verdict and direct a new trial at its discretion. (*Lansing v. Russell*, 2 N. Y. 563; *Colie v. Tiff*, 47 id. 119; *Clarke v. Brooks*, 1 Abb. Ct. App. Dec. 355.) And, because the granting of a new trial was a matter resting in the discretion of the court below, the order did not come within the statute providing for appeals (Code of Civ. Pro. § 190), and was not appealable to this court. (Id. § 1347, subd. 2; see cases before cited.)

The consequence must be a dismissal of the appeal. It may also be observed that nothing would have been presented by this appeal for review if the action had been triable as matter of right by jury. The reason is, that in the motion for a new trial were involved questions of fact which may or could have been considered in its determination by the court below. In such case an order granting a new trial, when the trial was had by jury, is not reviewable in this court. (*Wright v. Hunter*, 46 N. Y. 409; *Arnold v. Robertson*, 50 id. 683;

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Fallon v. Brooklyn City, etc., R. R. Co., 56 id. 652; *Courtney v. Baker*, 60 id. 1; *Harris v. Burdett*, 73 id. 136; *Whitson v. David*, 81 id. 645; *Bronk v. N. Y. & N. H. R. R. Co.*, 95 id. 656; *Kennicutt v. Parmelee*, 109 id. 650.)

The appeal must be dismissed.

All concur, except POTTER, J., not voting.

Appeal dismissed.

SIMON STETTHEIMER, Respondent, *v. THEOBALD W. TONE et al., Impleaded, etc., Appellants.*

Defendants were copartners doing business as private bankers. All capital was furnished by S., the other members contributing simply their services. S. was advised by his partners that the firm was about to suspend. He had at the time to his credit in a private account with the firm over \$10,000, consisting of deposits made independent of his capital account. S. drew his individual check on his private account which he delivered to plaintiff with directions to pay therewith certain debts of his. All the other partners had knowledge of the check and its purpose, and it was agreed that it should be paid out of the cash items then in hand, and the check was charged to the said individual account. On presentation of the check one of the partners offered to pay the amount in currency, but at plaintiff's request a draft was given instead, drawn by the firm upon a New York bank, which was not paid. In an action upon the draft the defendants, other than S., defended on the ground that plaintiff had no title to the draft, but that S. was, in fact, the owner and that the latter could not in his own name, or in that of another, maintain an action against himself and copartners as makers of the draft. *Held*, untenable; that so far as his deposit account was concerned S. stood in the same position toward the firm, as between the copartners, as that of any other depositor, and could have enforced his right to draw out the fund in an action brought directly against his partners; and that he could transfer this right, and having so done, it was no concern of his partners, and they were not entitled to inquire as to whether the transfer was with or without consideration; also, that, as the rights of creditors were not involved, the fact that the firm had failed did not affect defendants' liability.

(Argued May 1, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order

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made the first Tuesday of June, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and denied a motion for a new trial.

This action was upon a draft drawn by the firm of Stettheimer, Tone & Co., of which firm defendants were the members, private bankers, for \$10,000, payable to plaintiff.

The facts are sufficiently stated in the opinion.

Theodore Bacon for appellants. Remedies at law are forbidden between partners, they must resort to equity for a determination of their respective rights upon an accounting. (*Mainwaring v. Newman*, 2 B. & P. 120; *Bosanquet v. Wray*, 6 Taunt. [1 E. C. L. R.] 597; *Robson v. Curtis*, 1 Stark. [2 E. C. L. R.] 78; *Eastman v. Wright*, 6 Pick. 316; *Casey v. Brush*, 2 Cai. 293; *Arnold v. Arnold*, 90 N. Y. 580; *Burley v. Harris*, 8 N. H. 243; *Learned v. Ayres*, 41 Mich. 677; Story on Part. § 221; Collyer on Part. §§ 643, 902; Lindley on Part. 739-744.) Where all the partners become bankrupt, the general rule is that the separate estate of one partner shall not claim against the joint estate of the partnership in competition with the joint creditors, nor the joint estate against the separate estate in competition with the separate creditor. (Collyer on Part. [4th Am. ed.] § 990; *In re Rieser*, 19 Hun, 202; *Ransom v. Vanderventer*, 41 Barb. 307, 316; *Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 id. 146, 162; *Crook v. Rindskopf*, 34 Hun, 457.) Neither Sigmund Stettheimer nor this plaintiff, who stands in his shoes, can maintain an action upon the draft any more than for money lent. (*Nat. Bk. of Champlain v. Wood*, 45 Hun, 411, 414, 415; *Davis v. Merrill*, 51 Mich. 480.) The court erred in charging the jury that their "verdict does not affect the rights of any creditors of the firm," and afterwards that "the creditors have a remedy over in another way." (Broom's Legal Maxims, 571-583; Story on Part. §§ 131, 132, 163; Collyer on Part. § 575; *Adams v. Barnes*, 17 Mass. 365; *Calkins v. Allerton*, 3 Barb. 171; *Voorhees v. Seymour*, 26 id. 569, 583, 584; *Candee v. Lord*, 2 Comst. 269, 274-276.)

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James Breck Perkins for respondent. The deposit was a cause of action distinct from the partnership accounts, and an action upon it could have been maintained by Sigmund Stettheimer himself. (*Howard v. France*, 43 N. Y. 593.) Although, ordinarily, one partner cannot sue his copartner at law in respect to his partnership dealings, if the cause of action is distinct from the partnership accounts and does not involve their consideration, the action may be maintained. (*Crater v. Bininger*, 45 N. Y. 545; *Parsons on Partnership*, § 273.) This money belonged in equity to Sigmund Stettheimer's creditors, and he transferred the account to Simon and directed him to take the money, pay the \$8,015.56 to his brother, and the balance to other creditors. He also gave him a check for the amount. This was enough to be a good transfer. (*Gray v. Barton*, 55 N. Y. 68, 72; *Taylor v. Kelly*, 5 Hun, 115; *Westerlo v. Dewitt*, 36 N. Y. 340.) Certain particular and distinct transactions may be separated from the affairs or business of the partnership by the agreement of the parties. (*Collamer v. Foster*, 26 Vt. 754; *Gibson v. Moore*, 6 N. H. 547; *Story on Partnership*, 273; *Jackson v. Stopherd*, 2 C. & W. Exch. 361, 366; *Howard v. Francis*, 43 N. Y. 593; *Arnold v. Arnold*, 90 id. 580, 584.)

PARKER, J. The defendants, for some time prior to February 13, 1879, were copartners doing business as bankers. The entire capital, \$50,000, was furnished by Sigmund Stettheimer, while the other members of the firm contributed their energies and skill to the business. The adventure resulted in a general assignment for the benefit of creditors on the day mentioned.

In October, 1878, Sigmund Stettheimer deposited, of his private funds, \$8,015.56 in the Importers and Traders' Bank of New York, with the intent to transmit such amount to his brother in Frankfort, Germany, in payment of his indebtedness to him, as soon as he should be advised by his brother of the manner in which he desired the transmissions to be made. One of the defendants, Tone, who appears to have had charge of the general management of the business, solicited Stett-

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heimer to deposit the money with the firm until he should receive the direction from his brother, for which he was waiting, and then he would send it to him. Stettheimer consented, and on November 11, 1878, the account was transferred from the Importers and Traders' Bank to that of the defendants, and the amount credited to Stettheimer on his pass-book and private account with the defendants. On the evening of February 12, 1879, he was informed by his partners that the firm was about to suspend. At that time he had to his credit in his private account, which was entirely distinct from his capital account, a little over \$10,000. It consisted of deposits made from time to time, and the amount transferred from the Importers and Traders' Bank. During the evening Sigmund Stettheimer drew his individual check on his private account, payable to the order of the plaintiff, and delivered it to him with directions to pay his brother the amount which he owed him, and also his other individual creditors.

The evidence tended to show that all of the partners had knowledge of this check and its purpose, and, in view of the existence of such testimony, the manner of its submission to the jury by the trial court, and the finding of the jury, it must be assumed that such fact was found. After the check was drawn it was agreed, in the presence of all the partners, that it should be paid out of the cash items then in hand, and the check charged up to the individual account of Sigmund Stettheimer. To accomplish the agreement of the parties the plaintiff went to the bank where all of the defendants, except Sigmund, who was old and infirm, were engaged in arranging the affairs of the bank preparatory to the making of a general assignment. He presented the check for payment, and one of the defendants, Tone, offered to pay the amount of the check in currency. Plaintiff for some reason stated that he preferred a draft on New York. The draft in suit was then drawn and delivered to him, and the check was taken by one of the partners and placed in a drawer where other checks of a like character were kept by the officers of the bank. Plaintiff at once indorsed and forwarded the draft

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to his correspondent for collection, but owing to the failure of the bank the draft was not paid. Subsequently this action was commenced to recover on the draft. The defendants Stettheimer did not appear in the action and suffered a default. The defendants Tone appeared and answered, and upon the trial assigned as reasons for resisting a recovery that the plaintiff had not the title to the draft. That their co-defendant and late partner Sigmund Stettheimer was, in fact, the owner, and the plaintiff acted simply as his agent in bringing the suit; that Stettheimer cannot, in his own name or in that of another person, maintain an action against himself and partners as makers of the draft.

The defendants Tone do not appear to be in a position to question the title of the plaintiff. The money on deposit was never contributed to the capital account. It was Sigmund's individually, and it was so understood by every member of the firm. By the understanding and agreement of the partners, so far as this deposit was concerned, he occupied the same relation towards the firm (as between themselves) as that of any other depositor. So long as he was not in default, under the articles of the copartnership, he had the same right to draw out this fund as had the other depositors. A right which could have been enforced in an action brought directly against his partners. (*Crater v. Bininger*, 45 N. Y. 545.)

After the check had been drawn and delivered to the plaintiff, all of the parties being present, this right was fully recognized and acquiesced in, and it was agreed that the money should be paid. The check was handed in by the person to whom it was made payable, and payment thereof in cash actually tendered by one of the defendants Tone. Plaintiff preferred payment by draft, and one was drawn by the firm on New York and delivered to him. If, then, the plaintiff had the right to draw out the money, he also had the right to transfer it. Whether the transfer was with or without consideration was no concern of his partners. And having given the firm draft in payment of the check by which Sigmund

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sought to transfer the funds, these defendants Tone cannot now, in an action against them and the other partners as drawers thereof, be permitted to inquire into the consideration moving between Sigmund and the plaintiff; and the fact that the firm has since failed does not affect the legal liability of the defendants thereon. The rights of the creditors of the partnership are not involved in this action. The assignee is not a party and attacking the transaction as fraudulent. The question presented is simply one of liability of the defendants on their draft, as between themselves and the plaintiff, the payee therein.

The excuse presented for the non-production of the letter written to Sigmund's brother was not sufficient to justify the court in receiving secondary evidence of its contents. Under our view of the case, however, the evidence could not possibly have affected the result. It does not, therefore, constitute such an error as justifies a reversal. The other rulings excepted to do not seem to require discussion.

The judgment appealed from should be affirmed.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Judgment affirmed.

THOMAS B. MUSGRAVE, Respondent, v. WILLIAM F. BUCKLEY,
Appellant.

It was agreed between the parties that plaintiff should subscribe on joint account for a certain amount of railroad bonds offered for sale by a construction company, plaintiff to advance the money to pay the installments and to carry the subscription until disposed of for their joint benefit. By the terms of the subscription ten per cent of the subscription price was to be paid down and the balance in installments as called for. In case of default in payment of any installment the company had the option to forfeit the subscription and all installments previously paid. Plaintiff paid the ten per cent down, but the bonds having declined in the market refused to pay subsequent installments, and the parties agreed to let the company exercise its option, which it did. In an action to recover one-half of the installment paid, *held*, that defendant was not bound to agree to the forfeiture and could have advanced the money

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and paid the calls, but having decided not to do so and the forfeiture having been declared with his concurrence, he was liable to pay his share of the loss.

(Argued May 2, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made June 7, 1886, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts are sufficiently stated in the opinion.

John E. Parsons for appellant. As the payment by the plaintiff of the calls was not only thus the sole consideration for the defendant's sharing with him the profits or losses, but was necessarily to precede it in point of time, the former was a condition precedent of the latter. (*Grant v. Johnson*, 5 N. Y. 247; *Pordage v. Cole*, 1 Saund. 320.) Having broken his agreement the plaintiff had no right to hold the defendant to responsibility for one-half of the loss which was due to his own default. (*Smith v. Brady*, 17 N. Y. 173, 187; *Crane v. Knubel*, 61 id. 645.) The concurrence by the defendant subsequent to June 1, 1882, in the forfeiture of the subscription and of the \$20,000 installment which had been paid, operated neither as a waiver of performance by the plaintiff of his agreement nor as a release to him for his breach. (*Underwood v. Farmers' Ins. Co.*, 57 N. Y. 500; *Ripley v. A. Ins. Co.*, 30 id. 136; *Crane v. Knubel*, 61 id. 645; *Fallon v. Lawler*, 102 id. 228.)

George W. Ellis for respondent. When two persons enter into a joint venture, and the venture comes to an end with a loss, an obligation arises from the nature of the original relation that each will bear equally the loss; and if one party has stood more than his share, he can require his associate to contribute. (Story on Eq. Jur. §§ 504, 505. Willard's Eq. [Potter's ed.] 118; 1 Wait's Actions and Defenses, 182; 2 id.

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288-303; 3 id. 172; 5 id. 124; 4 Johns. Ch. 334; 57 N. Y. 331; *Finley v. Stewart*, 56 Penn. St. 183; *Guibert v. Saunders*, 10 N. Y. S. R. 43; *Biseell v. Harrington*, 18 Hun, 81; *Cooper v. Eyre*, 1 H. Black. 48; *Holmes v. United Ins. Co.*, 2 Johns. Cas. 329; Collyer on Part. [6th ed.] § 18; Ewel Lindley on Part. [2d Am. ed. 1888] 385; 3 Kent's Com. 28; Taylor on Ev. [8th Eng. ed.] 203; *Cunningham v. Littlefield*, 1 Edw. Ch. 104; *King v. Barnes*, 4 N. Y. 893; *Whitcomb v. Converse*, 119 Mass. 38; *Munro v. Whitman*, 8 Hun, 553; *Hodgman v. Smith*, 13 Barb. 302; *Neudecker v. Kohlberg*, 3 Daly, 410; Wentworth's Lindley on Part. 402, 403.) When the plaintiff was taken into this venture by the defendant they became partners in the venture. The failure, without good reason of either, from that time forward to do what he had agreed to do would make the offending party liable in damages for breach of his agreement, but such a failure was not, in any sense, a breach of a condition precedent which would work a forfeiture of his rights already fixed. (20 N. Y. 432; 45 id. 464; *Boyd v. Mynatt*, 4 Ala. [N. S.] 79, 82; Parsons on Part. [3d ed.] 384; *Hartman v. Woehr*, 18 N. J. Eq. 383; *Stoughton v. Lynch*, 1 Johns. Ch. 467; Story on Part. § 203.) The unnecessary outlay of further money on or after January, 1882, in the payment of further calls would have been prejudicial to the joint account, and for that reason each party was bound in good faith to the other not to do it or ask it to be done. (Story on Part. § 183; 110 N. Y. 73; 52 How. 48; 16 Johns. 491; 3 K. & J. 88; 81 N. Y. 28.) Defendant expressly consented to let the joint venture be ended, by allowing the construction company to forfeit the subscription and the installment already paid. (*Butterfield v. Cowing*, 21 N. Y. S. Rep. 500; 7 Wait's A. & D. 361.) A breach of an agreement to carry securities, pledged as collateral for the purchase-price, is only regarded as the breach of a condition subsequent to the purchase, entitling the customer to show damages, if he can, but never forfeiting the amount actually advanced by the banker. (*Capron v. Thompson*, 86 N. Y. 418; *Gruman v. Smith*, 81 id. 27;

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Colt v. Owens, 90 id. 368; *Wright v. Bk. of Metropolis*, 110 id. 237.) Where time is not of the essence of a contract, in order to forfeit the rights of one of the parties thereunder, notice must be given by the other requiring performance within some reasonable time therein specified, and that in case of default his rights will be deemed abandoned. (*Myers v. De Mier*, 52 N. Y. 647; *Buck v. Buck*, 18 id. 341; *Avery v. Bowden*, 5 E. & B. 714; *Miesel v. Globe Ins. Co.*, 76 N. Y. 119; *Thomas v. Fleury*, 26 id. 26.)

HAIGHT, J. This action was brought to recover one-half of the losses sustained by reason of a forfeiture of a subscription on joint account for \$200,000 of the bonds of the New York, West Shore & Buffalo Railway Company.

The North River Construction Company had undertaken to build and equip for the New York, West Shore & Buffalo Railway Company a double track railway from a point opposite of the city of New York, along the west shore of the Hudson river and the south bank of the Mohawk river, and thence to the city of Buffalo, and to receive in payment therefor the mortgage bonds and capital stock of the railway company. The North River Construction Company had opened a subscription book for the bonds of the railway company, in which the subscribers undertook to pay the construction company par and accrued interest for the bonds to the amount set opposite their respective names, upon the conditions that ten per cent of the subscription shall be paid upon call, and thereafter not more than ten per cent shall be called at any one time, and on at least ten days' notice. A default in the payment of any installment entitled the company, at its option, to forfeit the subscription and all installments previously paid. Each subscriber, upon the payment of the entire amount subscribed by him, was entitled to receive the bonds subscribed for, and, in addition thereto, fifty per cent of the par of his subscription in certificates representing full paid capital stock of the railway company. The defendant subscribed for the bonds for the par value of \$200,000, and paid the first instal-

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ment of ten per cent, amounting to the sum of \$20,000. The plaintiff and defendant had entered into an arrangement to the effect that the subscription so taken in the name of the defendant should be owned and disposed of for their joint account, and, as a consideration therefor, the plaintiff agreed to furnish the money with which to pay the installments and to carry the subscription until disposed of for their mutual benefit. Pursuant to such arrangement, the plaintiff paid to the defendant \$20,000, the amount of the first installment paid by him. At the time of this agreement the bonds were considered valuable, but thereafter and about the 1st of November, 1881, they fell below par. In January, 1882, they were worth but ninety cents on the dollar, and in the following April only about seventy cents. On the 6th day of January, 1882, the construction company made a call for ten per cent of the subscription, and on the eighth of April made another call of like amount. The plaintiff refused to advance the money for these calls, and thereafter, and on the 15th day of August, 1882, the construction company exercised its option and declared the subscription and the payment made thereon forfeited. The defendant claims that the plaintiff ought not to recover for the reason that he refused to advance the money with which to pay the January and April calls, thereby causing a default which permitted the construction company, at its option, to forfeit the subscription and installment paid; and that the fact that the market-value of the bonds had declined formed no excuse for such default. We do not consider it necessary to enter upon a discussion, or to determine the legal propositions thus raised, for we consider them fully answered by the fact that the plaintiff and defendant conferred together in reference to the calls for installments and agreed to let the construction company avail itself of its option to forfeit the subscription and the amount paid thereon; and thereafter the option was exercised by the company and the forfeiture made, with the concurrence of both the plaintiff and the defendant. These facts were found by the referee upon a conflict in the testimony. They are in accordance with the

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testimony of the plaintiff and have been affirmed by the General Term, and are not subject to further review in this court. (Code of Civil Procedure, § 1337.)

The defendant was not bound to agree to the forfeiture; he was under no obligation to do so unless he thought it was for the best interests of himself and associate. There was no forfeiture until the 15th day of August, 1882; true, there had been a default as early as the January before, but a forfeiture did not take place at the time there was a default. The forfeiture was only at the option of the construction company, and, until that company saw fit to exercise it, the defendant could have paid the calls and prevented a forfeiture. It is not a question of waiver or estoppel; it is a question of agreement by the parties as to what was best under the circumstances. At the time they agreed to submit to the forfeiture either party was at liberty to advance the money and pay the calls. The question was, whether it was advisable to do so. At the time of the January call the bonds had depreciated to such an extent that the \$20,000 paid in at the time of the subscription was an entire loss; and the decline at the time of the second call showed that there would be an additional loss of about \$40,000 if the calls were paid. Under these circumstances it is not surprising that the parties reached the conclusion that they had rather submit to a forfeiture and lose the \$20,000 than pay the calls then amounting to \$40,000 and lose that also.

The judgment should be affirmed, with costs. So ordered.

All concur.

Judgment affirmed.

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144 73

THOMAS J. RITCH, Jr., as Administrator, etc., Respondent. v.
HENRY W. HAWXHURST, Appellant.

The will of H. gave legacies of \$50 to each of his three sons, and directed his residuary estate to be equally divided between his six children. The will contained this clause: "Whatever obligations shall be found that I hold against my sons for whatever I have let them have heretofore shall be considered as my property and shall be considered as their legacy, in whole or in part, as the case may be." At the time of the making of the will the testator was worth \$10,000 over all liabilities; he held notes at that time and at the time of his death against defendant, one of his sons, to the amount of \$900, by their terms payable with interest. Defendant's distributive share of the residuary estate was less than the amount of the notes. In an action upon the notes, *held*, that it was not the intent of the testator to treat the notes as a gift or advancement, but his design was that they should be treated as a legacy to an amount equal to the legatee's share in the estate and as a debt for the residue.

When the language of a provision of a will is plain and free from ambiguity, effect must be given it in accordance with its terms. When it is equivocal the intention of the testator must be sought for by reference to all the provisions of the will and to such circumstances as may properly be entitled to consideration.

In such case there is no inflexible rule of interpretation to govern the determination of that inquiry, but when the intention is ascertained the language and mode of expression may be subordinated to such intention.

(Argued May 3, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 23, 1886, which reversed a judgment in favor of plaintiff, entered upon a decision of the court without a jury, and granting a new trial.

This action was brought to recover upon two notes made by the defendant, with his seal affixed, of dates November 10, 1869, and March 11, 1870, for \$500 and \$400, payable to Nathaniel O. Hawxhurst, "or to his executors or administrators," with interest, the former at five and the latter at six per cent.

The payee afterwards died leaving his will, dated June 11,

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1875, which was admitted to probate, and letters testamentary were issued to the surviving executor nominated by him.

The will following the formal preliminary clause was as follows :

"*First.* I appoint my son William C. Hawxhurst and Joseph Whitson to be the executors of this my will, with full power to sell and dispose of my estate, both real and personal, and execute good and lawful deeds for the same when, in their discretion, they shall think best, at either public or private sale. And my will likewise is that whatever obligations shall be found that I hold against my sons for whatever I have let them have heretofore shall be considered as my property and shall be considered as their legacy, in whole or in part, as the case may be.

"*Next.* After all my debts and funeral expenses are paid, then in dividing the balance, let the three sons take each \$50 (fifty dollars) first, and then the balance be equally divided, share and share alike, among the six, reckoning Ann Elizabeth among the rest."

On the death of the executor the plaintiff was appointed administrator with the will annexed. Said notes came to his hands among the assets of the testator. The defendant alleged that by the will the notes were bequeathed to him. The trial court dismissed the complaint.

The further material facts are stated in the opinion.

John R. Reid for appellant. The language of testator should not be construed with the precision and exactness of a statute, nor even the strictness of a contract. (*Phillips v. Davies*, 92 N. Y. 193; *Lytle v. Beveridge*, 58 id. 598.) Where words are ambiguous they will not be departed from merely because they may lead to consequences that may be regarded as capricious or even harsh and unreasonable. (*Abbott v. Middleton*, 7 H. L. C. 89; *Gordon v. Gordon*, L. R., 5 H. L. 254, 284.) The court will exercise its power to construe a will, but not to make it anew. (*Seguine v. Seguine*, 4 Abb.

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Ct. App. Dec. 191, 194; *Clapp v. Fullerton*, 34 N. Y. 192, 196; *Phillips v. Davies*, 92 id. 199, 204; *Lytle v. Beveridge*, 58 id. 598, 602, 604.) The intention of testator expressed in his will must govern; and this must be determined exclusively by the words of the instrument as applied to the subject-matter, and the surrounding circumstances. (*Christie v. Phyfe*, 19 N. Y. 344, 348; *Jackson v. Laquere*, 5 Cow. 221; *Arcularius v. Geisenhainer*, 3 Bradf. Sur. 64.) Where at first a special and subsequently a general term is used, plainly having reference to the same matter, the latter should be limited to the former. (*Christie v. Phyfe*, 19 N. Y. 348.) There can be no presumption or any other intent than that which the words employed in a will express and the rule which permits a construction, in aid of an intent not clearly expressed, never allows a disregard of plain provisions which speak positively and which must have full effect given to them, even though the result may be to make it impracticable to execute the will as to all its provisions. (*Myers v. Eddy*, 47 Barb. 263; *Van Nostrand v. Moore*, 52 N. Y. 12; *Schauber v. Jackson*, 2 Wend. 33.)

George C. Brainerd for respondent. A transposition of clauses of a will the courts will resort to in cases where wills are unskillfully drawn and where it makes apparent the real purpose of the testator. (*Phillips v. Davies*, 92 N. Y. 199.) Neither the consideration for which the notes or obligations were given, nor the notes or obligations themselves, can properly be regarded as an advancement. (Bouvier's Law Dict.) Proof of the circumstances of the testator, at the time of making the will, is admissible in evidence; and the circumstances should be borne in mind as they throw light on the intention of the testator. (Greenl. on Ev. § 278; 86 N. Y. 91.)

BRADLEY, J. This will furnishes an instance of some obscurity in the declaration of a very simple purpose of the testator. And from its provisions, aided in construction, so far as it legitimately may be, by circumstances disclosed, it must be

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determined what his intention was in respect to the use or disposition to be made of the notes in question. When the language of a provision of a will is plain and free from ambiguity, effect must be given to its import. When it is equivocal, the intention of the testator in the use of the language employed by him, must be sought for by reference to all the provisions of the will, and to such circumstances as may properly be entitled to consideration. And in such case there is no inflexible rule of interpretation to govern the determination of that inquiry. While rules of construction may aid somewhat the way to a conclusion, they are not to be used to frustrate the intention of the testator, but when that is ascertained the language and mode of expression, if of doubtful import, may be subordinated to such intention. (*Lytle v. Beveridge*, 58 N. Y. 592; *Hoppock v. Tucker*, 59 id. 202; *Phillips v. Davies*, 92 id. 199.) The inquiry arises as to the purpose, which the testator intended to express by the provision of the will, that "whatever obligations shall be found that I hold against my sons, for whatever I have let them have heretofore, shall be considered as my property, and shall be considered as their legacy, in whole or in part, as the case may be." It is argued by the defendant's counsel that the testator by this provision forgave to the sons any debts represented by their obligations held by him, whether there was any residuum of the estate or not, and that if there was any residue, the distribution as directed by the next clause of the will had no relation to such obligation. In other words, that they were to constitute no part of his estate for the purposes of distribution. It appears that at the date of the will the testator's property was worth \$10,000, over his liabilities. It does not definitely appear by the record what was the amount of his estate at the time of his death, but the defendant's counsel says it produced a little less than \$4,000 for distribution, and there is some evidence which seems to permit that inference. The shares were six, into which the residue was to be equally divided after payment of debts and funeral expenses and after giving \$50 to each of the three

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sons. At the time the will was made the amount of his estate was such that the one-sixth of the residue, after payment of his debts and funeral expenses, would have been more than equal to that of the notes. The fact that the testator took the defendant's notes, is evidence that the amount represented by them was not intended as a gift or as an advancement at the time they were taken. And the will shows that he did not treat it as such, as in that case it would have constituted no part of his estate. (*Chase v. Ewing*, 51 Barb. 597; *Camp v. Camp*, 18 Hun, 217.) But, on the contrary, he, by his will, declared the notes to be his property, and thus constituting part of his estate. If the purpose of the testator was to give the defendant the notes without charging the amount against his share in the estate, it is difficult to see why he declared them his property and qualified the consideration of them as the defendant's legacy by the use of the words "in whole or in part, as the case may be." Whether the character of legacy should extend to the whole amount of the notes, is made dependent upon something within the purpose of the testator; something which might, in a certain event, so qualify it as not to permit the entire amount of the notes to be considered a legacy. Under what circumstances could it be a legacy, only in part, and also permit the defendant to take one-sixth of the residue after the payment of the debts and funeral expenses of the testator? In such case there would have been no occasion to qualify the gift of the notes. The phrase used by the testator is not consistent with the position assumed on the part of the defendant, that the notes were eliminated from the estate in his behalf for all purposes of distribution of the residue under the other clause of the will.

The testator could, if so disposed, by his will have converted this indebtedness of the defendant into an advancement. (*Green v. Howell*, 6 Watts & S. 203.) In that view it might, with some plausibility, be urged that it was within the design of the testator to make by his will the entire amount of the notes as an advancement, and in the event that they should exceed the amount of the defendant's share in the estate, then

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to be to that extent only considered a legacy. But this does not seem the fair or reasonable interpretation of the purpose of the testator. He appears to have treated the notes as his property at the time he made the will, and declares that they shall be considered his property. It is very likely that, in view of his then pecuniary situation, he had in mind the fact that the share of the defendant in the estate might at least equal the amount of the notes, and intended to be understood that, in such case, they should be wholly treated as the defendant's legacy, and, in that manner, satisfied; but in the event that his share in the estate should be insufficient to cover the amount of the notes, they should only in part go to him as a legacy. That view of the intention of the testator gives practical effect to all the provisions of the will, and renders it consistent with the circumstances, so far as they are indicated by its provisions or otherwise disclosed by the evidence. It does not appear that the testator held any debts or obligations in any form against any of his sons other than the defendant. The only purpose of discrimination between his children in respect to the distribution of his property among them, expressly declared by his will, was to give to each of his three sons \$50 in excess of the shares to his daughters, and nothing other than that in any manner appears to indicate that he did not deem his children equally worthy of his testamentary bounty, and in like manner entitled to it.

These views lead to the conclusion that the notes constituted a part of the estate of the testator, and that he did not intend by his will to treat them as a gift or advancement to the defendant; but his design was that they should be considered a legacy to the defendant so far as his share in the estate would permit.

The order should be affirmed and judgment absolute directed for the plaintiff.

All concur, except BROWN, J., dissenting, and VANN, J., not voting.

Judgment accordingly.

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THOMAS W. BROWNELL, Respondent, v. THE TOWN OF
GREENWICH, Appellant.

114 518
138 157

114 518
138 479

114 518
145 650

In a case submitted under the Code of Civil Procedure (§ 1279) to test the validity of certain town bonds, alleged to have been issued by defendant, it was stated that proceedings were instituted under the town bonding act of 1869 (Chap. 907, Laws of 1869), that the county judge "duly adjudged, determined and ordered" that the allegations in a petition, duly verified and presented, "are proved and substantiated;" that the petitioners represented a majority of the taxpayers and of the taxable property; that after such adjudication and order the county judge "duly appointed and commissioned" three duly qualified commissioners, who were duly sworn, and, assuming to act as officers of the town, issued bonds, purporting to be bonds of the town, which recited that they were issued by authority of said act, of which bonds those in question were a part; that said bonds were placed in the hands of one A., treasurer of the railroad, to sell and apply the proceeds to the purchase for the town of mortgage bonds of the railroad company; that this was done and the railroad used the avails in the construction of a continuation of its road, etc.; that plaintiff bought his bonds in good faith, paying par in cash. *Held*, that the admissions in the statement implied the existence of every fact essential to perfect regularity of procedure and to confer jurisdiction of the subject-matter and of the parties, including defendant; that it was, in effect, admitted that the persons appointed became commissioners of the town *de jure*, with authority to issue the bonds, and their acts, within the scope of their authority, were acts of the town; also *held*, that said commissioners could lawfully employ an agent to sell the bonds and invest the proceeds as directed.

The rule of pleading facts prescribed by the Code of Civil Procedure (§ 532), is applicable to the statements of facts required for the submission of a controversy; and statements of facts, which impliedly allege jurisdiction, are sufficient as admissions that jurisdiction exists.

It was claimed by defendant that the bonds were void because made payable in twenty years instead of thirty, as required by the town bonding act. The bonds bore date May 12, 1871; those in question were less than ten per cent of the whole issue; they were purchased and delivered in July, 1871, after the passage of the act of that year (Chap. 925, Laws of 1871), amending the town bonding act by authorizing the issuing of bonds payable at any time the commissioners may elect, less than thirty years, but requiring that not more than ten per cent of the whole issue "shall become due and payable in any one year." *Held*, that plaintiff had the right to assume that the bonds were issued under the statute as it stood at the date of delivery; that he was not bound to examine the entire series to see that no more became due in a single year than the statute

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permitted, and had the right to assume that defendant, through its lawfully appointed commissioners, would not do an act utterly void and so commit a fraud by taking plaintiff's money without consideration. Also, held (BROWN, J., dissenting), that the act of 1871 applied to bonds issued after it went into effect, in pursuance of a consent of taxpayers given and adjudicated upon before that time, and as so construed said act was constitutional.

Potter v. Town of Greenwich (92 N. Y. 662; 26 Hun, 326); *People v. Batchellor* (53 N. Y. 123); *Horton v. Town of Thompson* (71 id. 513) distinguished.

(Argued March 6, 1889; decided June 11, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, rendered June 30, 1887, upon a case containing a statement of the facts as agreed upon by the parties pursuant to section 1279 of the Code of Civil Procedure.

On December 31, 1884, the plaintiff commenced an action against the defendant, based upon the facts hereinafter stated, but subsequently the parties agreed that said action should be suspended and the questions in difference submitted to the Supreme Court as of the date when the action was commenced. They further agreed that, for the purpose of the application of any statute of limitations or claim of laches, the case containing the agreed statement of facts should be deemed to have been duly filed on said 31st of December, 1884.

The most material facts upon which the controversy depends, as set forth in the case, are as follows: The defendant is a domestic municipal corporation and is one of the towns composing the county of Washington, in this state. In 1870 a railroad corporation, known as the Greenwich & Johnsonville Railroad Company, was trying to extend its railroad, by a bridge across the river dividing said town of Greenwich from an adjoining town, where its terminus then was, and to erect a depot and other terminal structures on the Greenwich side of the stream. In order to accomplish this the company, about August, 1870, issued its bonds for \$50,000, secured by a second mortgage upon the road and franchises. Subsequently, certain proceedings were instituted, pursuant to chapter 907

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of the Laws of 1869, to issue the bonds of said town, to aid in the construction of said road. What those proceedings were does not expressly appear, but the case states that on the 21st of March, 1871, the county judge of Washington county "duly adjudged, determined and ordered" that the allegations contained in a petition of certain taxpayers of said town, duly verified and presented to said judge under and by virtue of said act, "are proved and substantiated to my satisfaction, and that the said petitioners do represent a majority of the taxpayers of said municipal corporation of said town of Greenwich, in said county of Washington, as shown by the last preceding tax list or assessment-roll of said town, and do represent a majority of the taxable property of said town upon said list or roll, and that this order be entered and recorded in the office of the clerk of the county of Washington." Said judgment contains certain recitals and states that it was made "on reading the order granted on the presentation of said petition and after taking due proof of the notice issued thereon, and of the due publication of said notice and of the facts set forth in said petition." The judgment was duly entered and recorded in said clerk's office on the same day that it was rendered.

The taxable property of the town, as shown by said assessment-roll, was the sum of \$1,404,696. Immediately after such adjudication and order the county judge "duly appointed and commissioned" three duly qualified commissioners for said town for the purposes named in the act. Said commissioners accepted the appointment, were duly sworn and entered upon the discharge of their duty. Thereupon, assuming to act as officers of the town, they prepared, subscribed and sealed eighty bonds of \$500 each, dated March 25, 1871, payable July 1, 1891, with semi-annual interest purporting to be the bonds of the town and reciting that they were issued by authority of said act, with the assent of said town obtained according to law. Thereafter they placed said bonds in the hands of one Andrews, a bank president and the treasurer of said railroad company, with directions to sell the same for

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cash and to apply the proceeds to the purchase, for said town, of the second mortgage bonds of the railroad company at eighty cents on the dollar. Pursuant to such directions said Andrews sold the bonds of the town, from time to time as he had the opportunity, to different purchasers for cash and invested the proceeds in said railroad bonds at eighty per cent. The railroad company used the avails mainly in the construction of said bridge, continuing the road into the town and in the erection of depots, offices and other terminal buildings situate in said town. The railroad has been in actual operation ever since and the defendant has been in the full enjoyment of the advantages it sought. The commissioners received from said Andrews railroad mortgage bonds to the amount of \$50,000 par value, and so far as appears the town still owns the same. None of the funds received by Andrews upon the sale of the bonds of the town actually went into the hands of the commissioners, and he did not account to them therefor except by delivering to them the railroad bonds for the avails thereof, as aforesaid. On July 1, 1871, the plaintiff bought of said Andrews five of said town bonds at par, and paid therefor the sum of \$2,500 in cash, which was invested for the town in railroad bonds and applied to the use of the railroad company in the manner above stated. Until 1877, said company, in lieu of paying interest upon its bonds held by the town, paid semi-annually to the holders of the town bonds, including the plaintiff, the interest coupons attached thereto; and for the years 1877, 1878, and up to and including January 1, 1879, the defendant paid the interest semi-annually to said holders with moneys raised by taxation in the usual way. The last payment by the town to the plaintiff was the sum of \$175, made during the latter part of January, 1879, as and for the interest due on the first of that month upon his five bonds. Since 1880 the town has repudiated said bonds and coupons and has insisted that it was not liable thereon, mainly upon the ground that the bonds are void on their face because issued for a term not authorized by law. It is further admitted that

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the plaintiff purchased his bonds in good faith and upon the representation of said Andrews that they were good and valid and in the belief that they were so. A majority of the commissioners intended to properly perform their duties as such, and believed that the bonds were valid and legal. The remaining commissioner is now dead, and his motives are not known except that he acted with his colleagues in all matters pertaining to the bonds.

Esek Cowen for appellant. Jurisdiction is only presumed in the case of a court of general jurisdiction proceeding according to the course of the common law. In cases of courts of limited jurisdiction the facts constituting the jurisdiction must be alleged and proven. (*Mills v. Martin*, 19 Johns. 33; *Thomas v. Robinson*, 3 Wend. 267; *Wheeler v. Raymond*, 8 Cow. 311.) The recitals in the judgment fail, in several particulars, to show the facts conferring jurisdiction on the county judge. (*People v. Spencer*, 55 N. Y. 1; *Angel v. Town of Hume*, 17 Hun, 374.) It was necessary to give the county judge jurisdiction that a petition, stating facts made necessary and indispensable by statute, should be presented to him, and that a notice of a particular character should be published for a certain space of time. (*People v. Walker*, 23 Barb. 304.) The allegation that some act of a court was "duly" performed was not equivalent to an allegation of jurisdictional facts. (*Cleveland v. Rogers*, 6 Wend. 438; *Ladbroke v. James*, Willes, 199; *Mills v. Martin*, 19 Johns. 7.) The bonds, showing on their face that they are authorized by the statute under which they purport to be issued, are absolutely void, and there can be no such thing as a *bona fide* holder of such bond. (*Starin v. Town of Genoa*, 23 N. Y. 439; *Gould v. Town of Sterling*, Id. 456; *People v. Mead*, 24 id. 114; *Horton v. Town of Thompson*, 71 id. 513.) The non-compliance with the law appearing on the face of the bond, any purchaser was charged with notice of its invalidity. (*Horton v. Town of Thompson*, 71 N. Y. 513.) There has been no ratification of these bonds by the town. (*Town of*

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Gallatin v. Houcks, 21 Barb. 578; *Lorillard v. Town of Monroe*, 11 N. Y. 392.) A contract that is illegal on its face cannot be ratified. (*Smith v. City of Newburgh*, 77 N. Y. 130; *Horton v. Town of Thompson*, 71 id. 574; *Delafield v. State of Illinois*, 26 Wend. 227.) A ratification of an unauthorized act of an agent must be with full knowledge of the facts. (*Nixon v. Palmer*, 8 N. Y. 398; *Seymour v. Wyckoff*, 10 id. 213.) The town could not, in any event, be estopped as to this plaintiff. He did not purchase his bonds after the town had paid the interest in 1877 and 1878, or in reliance on such payment. (*Calhoun v. D. & M. R. R. Co.*, 28 Hun, 402.) The power to sell bonds is not a power to borrow money. (*Starin v. Genoa*, 23 N. Y. 429; *People v. Mead*, 24 id. 115; *Horton v. Thompson*, 71 id. 513.) A town, under the laws of this state, is not a municipal corporation. (*Lorillard v. Monroe*, 11 N. Y. 392; *Town of Gallatin v. Loucks*, 21 Barb. 575.) The commissioners were not in any sense officers of the town. (*Horton v. Thompson*, 71 N. Y. 513; *Springport v. Teutonia Sav. Bk.*, 75 id. 406.) The maxim *delegatus non potest delegare* applies with full force to public officers charged by law with special duties. In matters involving personal trust and discretion they cannot employ agents. (*State v. Buffalo*, 2 Hill, 435; *Powell v. Tuttle*, 3 N. Y. 396; *Bd. of Excise v. Sockrider*, 35 id. 154; *Lewis v. Ingersoll*, 1 Keyes, 356.) The bonds are void in plaintiff's hands, not because he had actual notice, but because the commissioners could not bind the town. (*Alvord v. Syracuse Sav. Bk.*, 98 N. Y. 599; *Smith v. City of Williamsburgh*, 24 Barb. 427; *Marsh v. Fulton Co.*, 10 Wall. 676; *McClure v. Township of Oxford*, 94 U. S. 429.)

D. M. Westfall for respondent. All the provisions of the statute were fully complied with to duly authorize the commissioners to act for and bind the town under the statute. (44 Hun, 611.) The adjudication of the county judge itself establishes the existence and proper presentation of all the facts required to give jurisdiction. (*Bunstead v. Read*, 31

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Barb. 668; *Sheldon v. Wright*, 5 N. Y. 514; *Dyckman v. Mayor, etc.*, Id. 440; *Skinnion v. Kelly*, 18 id. 356; *Porter v. Purdy*, 29 id. 110; *Ferguson v. Crawford*, 70 id. 265; *Roderigas v. E. R. S. Inst.*, 63 id. 464; *Craig v. Town of Andes*, 93 id. 410.) As to all matters within the purview of the statute, the acts of the commissioners, whether by themselves or by their direction, were the acts of the town. (*Horn v. Town of New Lots*, 83 N. Y. 101, 107; *Gould v. Town of Oneonta*, 71 id. 298.) The bonds involved in this action are valid, notwithstanding they are made payable less than thirty years from their date. (*Horton v. Town of Thompson*, 71 N. Y. 513; *Cagwin v. Town of Hancock*, 84 id. 532; *Town of Thompson v. Perine*, 23 Alb. L. Jour. 505; 103 U.S. 806; *Supervisors v. Schenck*, 5 Wall. 772; *State ex rel. Ross v. Anderson*, 8 Baxter, 249; *Whitney v. Town of Potter*, 18 Blatchf. C. C. 165; *Pendleton Co. v. Amy*, 13 Wall. 297; *Comrs. v. January*, 4 Otto, 202; *Irwin v. Town of Ontario*, 18 Blatchf. C. C. 259; *Singer Mfg. Co. v. Town of Elizabeth*, 42 N. J. L. 235, 257; *Rock Creek v. Strong*, 96 U. S. 271; *Oregon v. Jennings*, 119 id. 74; *Alvord v. S. S. Bank*, 98 N. Y. 600; *Peterson v. Mayor, etc.*, 17 id. 463; *Hoyt v. Thompson's Exrs.*, 19 id. 218.) Until the contrary appears the legal presumption is that all bonds were issued at their date, March 25, 1871. (*Seymour v. Van Slyck*, 8 Wend. 403, 414; *People v. Snyder*, 41 N. Y. 397, 402.) It is competent to show that the delivery was upon another day than the date. (*Van Rensselaer v. Vickey*, 3 Lans. 59; *Elsey v. Metcalf*, 1 Denio, 323, 326.) The bonds had no legal inception until they were delivered to some person as evidence of a subsisting debt. (Edw. on Bills [2d ed.] 175; *Cattin v. Gunter*, 11 N. Y. 368, 371; *Lansing v. Gayne*, 2 J. R. 301; *Marvin v. McCullum*, 20 id. 289; *Coddington v. Gilbert*, 17 N. Y. 489, 490; *Eastman v. Shaw*, 65 id. 527, 529; *Ahern v. Goodspeed*, 72 id. 108; *Angel v. Town of Hume*, 17 Hun, 374; *Syracuse Sav. Bk. v. Town of Seneca Falls*, 86 N. Y. 317, 321.) Even if the entire series of bonds (except Potter's) had been issued between May twelfth and July first, they could all

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be sustained as valid in the hands of *bona fide* holders, being negotiable instruments issued under apparent authority. (*Stoney v. The Am. L. Ins. Co.*, 11 Paige, 635, 637; *North River Bk. v. Aymer*, 3 Hill, 270; *Mechanic's Bk. v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 611, 625; *F. and M. Bank of Kent Co. v. B. and D. Bk.*, 16 id. 129, 134, 135; *Gifford v. Town of White Plains*, 25 Hun, 606.) The bonds should be so construed, if possible, as will validate rather than invalidate them. (*Calhoun v. D. & M. R. R. Co.*, 28 Hun, 395; *Town of Solon v. W. S. Bank*, 35 id. 2; *Rich v. Town of Mentz*, 18 Fed. Rep. 157; *Alvord v. Syracuse Sav. Bk.*, 98 N. Y. 599; *Town of Aurora v. Auditor*, 15 Fed. Rep. 843; *Whitney v. Town of Potter*, 18 Blatchf. 165; *Miller v. Town of Berlin*, 13 id. 245; *Town of Orleans v. Platt*, 99 U. S. 676; *Co. of Tipton v. Locomotive Works*, 103 id. 523; *Walnut v. Wade*, Id. 683; *Menasha v. Hazard*, 102 id. 81; *Block v. Commissioners*, 99 id. 686; *Johnson Co. v. January*, 94 id. 202; *East Lincoln v. Davenport*, Id. 801; *Schuyler Co. v. Thomas*, 98 id. 169; *San Antonio v. Mahaffy*, 96 id. 312; *Town of Coloma v. Eaves*, 92 id. 484; *Hackett v. Ottawa*, 99 id. 86; *Weyruwega v. Ayling*, Id. 112.) If the bonds are void for want of power in the commissioners to issue them in that form, then defendant is indebted to the plaintiff in the amount paid for them as for money loaned. (*D. D. Bk. v. A. L. Ins. and T. Co.*, 3 N. Y. 365, 368; *Schermerhorn v. Talman*, 14 id. 116, 117; *Coddington v. Gilbert*, 17 id. 289; *Eastman v. Shaw*, 65 id. 524, 527, 528, 530; *Ahern v. Good-speed*, 72 id. 108; *Town of Solon v. W. S. Bk.*, 35 Hun, 1; *Louisianna v. Wood*, 102 U. S. 294; *Gould v. Town of Oneonta*, 71 N. Y. 298.) If the bonds are void and the transaction was not a loan to the town, then the plaintiff should recover as for money had and received. (*Chapman v. City of Brooklyn*, 40 N. Y. 380, 382; *Newman v. Supervisors of Livingston Co.*, 45 id. 687, 688; *Hathaway v. Town of Cincinnatus*, 62 id. 447; *Nelson v. Mayor, etc.*, 63 id. 544; *Horn v. Town of New Lots*, 83 id. 106, 107; *Gouse v. City of Clarksville*, 1 McCrary, 78; *Shirk v. Pulaski Co.*, 4 Dill.

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209; *Louisiana v. Wood*, 102 U. S. 294; 5 Dill. 122; *Draper v. Springport*, 104 U. S. 501.) If the plaintiff cannot otherwise recover, equity demands a reformation of the bonds or the issuing of new and proper bonds. (4 Alb. Law J. 7; 6 id. 103; 36 id. 44, 45; *Pitcher v. T. P. R. Co.*, 10 Barb. 437; *Lansing v. Carpenter*, 48 N. Y. 412; *Pitcher v. Hennessey*, Id. 416, 424; *Stedwell v. Anderson*, 21 Conn. 139; *Champlin v. Laytin*, 18 Wend. 418, 419; *Boyd v. De La Montague*, 73 N. Y. 498, 503; *Martin v. McCormick*, 8 id. 331.) The fact that the commissioners acted through a broker or agent constitutes no defense. (*Mayor, etc., v. Sands*, 105 N. Y. 210, 217; *Lewis v. Ingersoll*, 1 Keyes, 347; *Calhoun v. D. & M. R. Co.*, 28 Hun, 398, 402; *Hathaway v. Town of Cincinnati*, 62 N. Y. 434, 447; *Town of Lyons v. Chamberlain*, 89 id. 591, 592; *Gould v. Town of Oneonta*, 71 id. 308; *People ex rel. D., etc. v. Batchellor*, 53 id. 141; *N. Y. & B. S. M. & L. Co. v. City of Brooklyn*, 71 id. 584; *Lloyd v. Mayor, etc.*, 5 id. 374, 375; *State ex rel. Ross v. Anderson*, 8 Baxter, 249; *Whitney v. Town of Potter*, 18 Blatchf. 165; *Peterson v. Mayor, etc.*, 17 N. Y. 453; *Hoyt v. Thompson*, 19 id. 218; *Town of Solon v. W. S. Bk.*, 35 Hun, 15; *Horn v. Town of New Lots*, 83 N. Y. 101, 107.) The statute of limitations cannot avail as a defense. (*Town of Solon v. Williamsburgh Sav. Bk.*, 35 Hun, 10; *People ex rel. D., etc., v. Batchellor*, 53 N. Y. 141; *Corkings v. State*, 99 id. 492, 499; *Bartlett v. Judd*, 21 id. 200, 205.)

VANN, J. By the bonding act of 1869 the defendant was transformed from a mere political division of the state, with limited corporate powers, into a municipal corporation with power to borrow money on an extensive scale and to invest it in the stock or bonds of such railroad company as a majority of its taxpayers, representing a majority of its taxable property, should designate. (Laws of 1869, chap. 907, p. 2303; *Horn v. Town of New Lots*, 83 N. Y. 100, 107.) Those powers, however, remained dormant and wholly ineffectual for any purpose, unless they were called into action by the determination

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of the county judge, based upon such proceedings as the statute requires. The first question to be decided, therefore, is whether the adjudication of the county judge was valid and binding upon the town, so as to bring into operation these new and important powers conferred by the statute under consideration. The parties admit that the county judge "duly adjudged, determined and ordered," the jurisdictional facts being first recited, that the allegations of the petition are substantiated, and that the petitioners represent a majority of the taxpayers and a majority of the taxable property of the town according to the last assessment-roll. They further admit that the county judge duly appointed and commissioned the commissioners, who accepted, qualified and acted. The statute authorized the county judge to so "adjudge and determine" only in case it had been in all things complied with. (Laws of 1869, chap. 907, § 2.) How, then, could he "duly" adjudge unless every step required had been taken? "Duly," in legal parlance, means according to law. (*Gibson v. People*, 5 Hun, 542, 543; *People ex rel. Hawes v. Walker*, 23 Barb. 304; *Fryatt v. Lindo*, 3 Ed. Ch. 239; *Burns v. People*, 59 Barb. 531, 543; *Webb v. Bidwell*, 15 Minn. 479, 484.) It does not relate to form merely, but includes form and substance both. The expression "duly adjudged," as used in the statement for the submission of this controversy, therefore, means adjudged according to law, that is, according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity of procedure, and to confer jurisdiction both of the subject-matter and of the parties affected by the judgment, including the defendant. A judicial officer has jurisdiction, when he has power to inquire into the facts, to apply the law and to pronounce the judgment. Any step in the cause or proceeding before him is necessarily the exercise of jurisdiction, and that step cannot be "duly" taken unless jurisdiction exists. The final step, in particular, the making of the judgment, cannot be "duly" taken unless all of the preliminary steps upon which it is based have likewise been duly taken.

We also think that the rule of pleading facts prescribed by

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section 532 of the Code of Civil Procedure may with propriety be applied to the statement of facts required by section 1279; and that whatever is a sufficient statement of the facts, according to the former, to impliedly allege jurisdiction, is a sufficient statement of the fact, according to the latter, that jurisdiction existed. (*Rockwell v. Merwin*, 45 N. Y. 166.) There is no reason for greater particularity in admitting facts for the submission of a controversy than in alleging them in a pleading.

The same reasoning applies with equal force to the admission that the commissioners were duly appointed and commissioned. This means that they were appointed by due authority or by the authority of law. According to the statute, the county judge had no authority to appoint them until he had adjudged and determined, in the manner and upon the proofs required, whether a majority of the taxpayers and taxable property were in favor of bonding. (Laws of 1869, p. 2305, § 3.)

The persons appointed, therefore, became commissioners of the town *de jure*, empowered to represent and to act for the town. (Id.) They were authorized to execute and issue "the bonds of such municipal corporation" and to affix "the seal of such corporation" thereto (§ 4); "to subscribe (for railroad bonds or stock) in the name of the municipal corporation which they represent;" "to represent either in person or by proxy such municipal corporation at all meetings of the railroad bondholders or stockholders;" to "vote for directors on the stock of such town" (§ 5); to provide a sinking fund to pay the bonds of the town, and under certain circumstances to sell the railroad stock or bonds belonging to the town. (§ 6.) The acts of the commissioners, as to all matters within the scope of the authority conferred upon them by the statute, were the acts of the town. (*Gould v. Town of Oneonta*, 71 N. Y. 298.) Hence, irregularities in the manner in which the commissioners may have performed their duties cannot affect the validity of the bonds issued in the hands of an innocent holder for value. (*Town of Solon v. Williamsburgh Savings Bank, ante*, p. 122.)

It was not necessary that merely executive acts, not involv-

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ing the exercise of discretion, should be done by the commissioners personally, but such acts might be done by another under their direction. (*Mayor v. Sands*, 105 N. Y. 210, 217.) "When a statute commands an act to be done, it authorizes all that is necessary for its performance." (Sedgwick's Const. and Stat. Laws, 245.) Hence the commissioners could lawfully employ Mr. Andrews as a broker to sell the bonds and invest the proceeds according to their instructions.

The plaintiff, therefore, when he paid his money for the bonds in question, paid it to the town, and the town received it and invested it in railroad bonds, which it is presumed to still hold, and which, in the absence of proof to the contrary, are presumed to be of value. The defendant received all that it contracted for, but what did the plaintiff receive? The defendant contends that he received nothing of any value, because, as it claims, the bonds delivered to him by the commissioners or by their direction are void, inasmuch as they were made payable in twenty years, while the bonding act of 1869 (§ 4), only authorized the issue of bonds "payable at the expiration of thirty years from their date." On the 12th of May, 1871, an act was passed by the legislature amending section 4 of the bonding act "by adding at the end thereof," the following provision: "The said commissioners may issue the said bonds payable at any time they may elect less than thirty years, * * * but they shall not so issue the bonds that more than ten per cent of the principal of the whole amount of bonds issued shall become due or payable in any one year." (Laws of 1871, chap. 925, § 6, p. 2119.) The question now arises whether the bonds of the plaintiff were actually issued before or after May 12, 1871, the date when said amendment took effect. They bear the date of March 25, 1871, and are presumed to have been executed at that time; but executing is not issuing, for they might be fully executed but never issued. It is clear that the purchaser of a bond from the obligor named therein simply lends the latter money. (*Coddington v. Gilbert*, 17 N. Y. 489; *Ahern v.*

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Goodspeed, 72 id. 108.) The essence of the original transaction between the parties, therefore, was a loan of money secured by the bonds of the borrower. The bonds had no legal inception and could not become valid obligations, aside from any other question, until actually delivered for a valuable consideration. Under the circumstances, we think that the delivery of the bonds to the plaintiff determines the date when his bonds were issued. In this vital respect the case differs from *Potter v. Town of Greenwich* (92 N. Y. 662; 26 Hun, 326), where the bonds were issued prior to the passage of the act of May 12, 1871. The plaintiff in that case bought his bonds in April of that year. The five bonds in question, therefore, were issued on the first of July, 1871, when they were first delivered as evidence of an existing debt. The plaintiff had the right to assume that they were issued under the statute as it stood at the date of the delivery, for he was dealing with actual commissioners, clothed with all the authority that the statute conferred. The mere inspection of his bonds would show that *they* were made payable as the statute then required. It does not appear that he had seen any of the bonds except those which he purchased, or that he knew that all of the bonds were payable at the same time, or even that any other bonds had been issued at the date of his purchase. He was not bound to examine the entire series to see that no more became due in a single year than the statute permitted. He was bound to examine his own bonds and was, doubtless, charged with knowledge of the bonding act and the bonding roll, as the one was a public statute and the other a public record, and both were accessible to all. How could he examine the remaining bonds? If they were not then issued, but still in the hands of the commissioners, an examination would be useless, for a purchaser of bonds issued according to law cannot be affected by the subsequent acts of the commissioners in issuing other bonds in a manner not in accordance with law. If they were issued, how could he find them, scattered in the hands of unknown owners? It would be unreasonable to charge him with knowledge of the contents of the rest

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of the bonds, or to declare his bonds void, because the others, of which he knew nothing and had no means of knowing, were, in fact, made payable at a time not authorized by the statute. A purchaser, under the circumstances disclosed, might assume that the defendant, through its lawfully appointed commissioners, would not do an act utterly void, and thereby commit a fraud upon one of its citizens by taking his money without any consideration.

The only other claim of the appellant that we deem it important to notice is, that the act of 1871 does not apply to bonds issued in pursuance of a consent of taxpayers given and adjudicated upon before that statute was passed, and that if the act can be construed as applying to such bonds, it is, to that extent, unconstitutional and void. In *Syracuse Savings Bank v. Town of Seneca Falls* (86 N. Y. 317), it was held that the act of 1871 applied to proceedings regularly taken prior to its passage. In that case the proceedings were terminated in August, 1870, when the county judge made the adjudication and record and appointed the commissioners, who delayed action until after May 12, 1871, when they subscribed for stock and issued the bonds. No further consent of the taxpayers was obtained. In *Angel v. Town of Hume* (17 Hun, 374), the adjudication was made April 22, 1871, and the bonds were issued in February and July, 1872. In both of these cases it was held that the judgment of the county judge, based solely upon the consent of the taxpayers to bond pursuant to the act of 1869, was not nullified nor avoided by the amendment of 1871. In neither of those cases had any taxpayer consented to such an issue of bonds as the amended act gave the commissioners the discretion to issue.

In *Gould v. Town of Sterling* (23 N. Y. 456), the consents were obtained prior to September 29, 1852 (pp. 443, 445), while the bonds were issued in August, 1853 (p. 457). In the meantime an act had been passed authorizing the interest upon the bonds to be made payable on the first days of January and July of each year, instead of March first as was provided by the original bonding act.

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The only authorities cited to sustain the position that the act of 1871 is unconstitutional are *People v. Batchellor* (53 N. Y. 128), and *Horton v. Town of Thompson* (71 id. 513). We do not consider either of them applicable to this case. The only constitutional questions involved in these cases were, in the former, whether the legislature could compel a town to become a stockholder in a railroad corporation by exchanging its bonds for stock without its consent in any way given; and, in the latter, whether the legislature could make a void bond valid after it had been actually issued to a person who could not claim as a *bona fide* holder.

In the case under consideration the consents had been duly given and an adjudication duly made to that effect when the amendatory act was passed. There was no want of power, therefore, to issue bonds, as the conditions precedent had all been complied with. The amendment did not extend to matters of jurisdiction, "but to that which the legislature might have dispensed with the necessity of by the prior statute." The bonding act would not have conflicted with the Constitution if it had contained no provision as to when the bonds should be made payable, but had left that to the discretion of the commissioners. That provision, therefore, so far as the Constitution is concerned, was immaterial and could be modified, even retrospectively, at the discretion of the law-making power.

In *Williams v. Town of Duaneburg* (66 N. Y. 137), the court said: "In this case the legislature could originally have authorized the bonds of the town * * * to be issued under the precise circumstances existing when they were issued; and if the acts of the commissioners have, by subsequent legislation, been ratified, it is equivalent to an original authority to do what has been done. The authorities as to the legislative power to validate, by subsequent legislation, acts done in assumed execution of a statute authority which has not been strictly followed, are numerous and decisive." (*People v. Mitchell*, 35 N. Y. 551; *Town of Duaneburg v. Jenkins*, 57 id. 177; *People ex rel Kilmer v. McDonald*, 69 id. 362;

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Tiff v. City of Buffalo, 82 id. 204; *Rogers v. Stephens*, 86 id. 623.) If the legislature has power, after bonds have been issued, to correct irregularities of official action without affecting the consents of the taxpayers previously given, its power to authorize a change in the form of the bond before it is actually issued, without impairing such consents, cannot well be denied.

Without examining any of the other grounds upon which we are urged to affirm the judgment appealed from, we think that it should be affirmed for the reasons already stated.

PARKER, J. By the act of May 12, 1871, the commissioners were authorized to issue bonds, payable in twenty years, aggregating in amount \$4,000. So much of the issue as was in excess of \$4,000 was without authority of law and void. But the subsequent unauthorized action of the commissioners in issuing bonds of the town could not, and did not, invalidate or affect the bonds aggregating \$4,000, for which act authorizations had been duly given.

The commissioners sold to this plaintiff bonds of the face value of \$2,500, \$1,500 less in amount than the authorized issue. It does not appear that after the passage of the act mentioned, and prior to the sale made to the plaintiff, the commissioners sold any other bonds. We are unable to say from the evidence before us that plaintiff's bonds were not issued to him before the limit of \$4,000 was exceeded.

The plaintiff then seeks to recover upon bonds regular upon their face, and in an amount less than the issue permitted by statute. The defendant attacks their validity upon the ground, among others, that the commissioners exceeded their authority by issuing more bonds payable in twenty years than the statute permitted. The burden, therefore, rested upon the defendant to establish such defense. It was incumbent upon it to show that plaintiff's bonds did not constitute a portion of the authorized issue of \$4,000. This it omitted to do, and, as a necessary consequence, failed to establish the defense interposed.

Dissenting opinion, per BROWN, J.

These views lead me to concur in the result arrived at by Judge VANN.

BRADLEY, J., concurs in the result on the ground that the bonds in question were issued after the act of May 12, 1871 (chap. 925), took effect, and that it may be presumed, nothing appearing to the contrary, that those bonds, at the time of their issue, did not make the amount issued, after such act took effect, exceed \$4,000.

BROWN, J. (dissenting). I dissent upon the ground that the taxpayers of the defendant never gave their consent to the issuing of bonds payable in twenty years. Such consent was essential to the validity of the instruments. The proceedings before the county judge, which terminated in the appointment of commissioners, were taken by authority of the act of the legislature of May 18, 1869, and authorized the issuing of bonds running for thirty years. The bonds in suit recite that they were issued by authority of that act. They bear date and were executed before the passage of the act of May 12, 1871. They are void upon their face. (*Potter v. Town of Greenwich*, 26 Hun, 326; affirmed, 92 N. Y. 662.) And were not, in my judgment, made valid by the act of the legislature last cited. The shortening of the period of payment deprived the taxpayers of the town of substantial benefits under the statute intended to provide for the payment of the bonds, and is more than a mere irregularity.

The legislature had no power to authorize a loan by the town to the railroad company without its consent (*People v. Batchellor*, 53 N. Y. 128; *Horton v. Town of Thompson*, 71 id. 513); and the act of May 12, 1871, cannot be construed as applicable to bonds executed pursuant to consents given before its passage, and which related to entirely different obligations.

For these reasons, I think, the judgment should be reversed.

All concur for affirmance, except BROWN, J., dissenting; POTTER, J., not sitting; BRADLEY and PARKER, JJ., concurring in result.

Judgment affirmed.

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PHILETUS P. ARGERSINGER et al., Respondents, v. RAMSEY MACNAUGHTON, Appellant.

Unless the character or quality of goods consigned to a commission merchant to sell is communicated to him by the consignors, it is his duty to ascertain what they are in that respect and put them upon the market only as such. No authority to undertake that the goods are in any respect other or different from what they are may be inferred from the simple power to sell.

In an action to recover damages for an alleged breach of warranty, it appeared that defendant, a commission merchant, as such, sold to plaintiffs a quantity of antelope skins, with a warranty as to quality, and that there was a breach of such warranty; that plaintiffs knew defendant was acting as agent in making the sale, but defendant did not disclose to them, nor did it appear that they knew the names of the principals. It did not appear that the principals gave defendant any description of the quality or condition, or that he acted otherwise than on his own knowledge or judgment in that respect in making the sale and warranty, nor was it found that he had authority from his consignors to warrant the goods. Evidence was given by defendant that it was the custom in the trade for commission dealers not to warrant goods sold. *Held*, that the warranty was defendant's undertaking and he was liable for its breach; that in such case the presumption is that the responsibility is upon the person with whom the vendee deals, and he is not required to look elsewhere.

Wright v. Cabot (89 N. Y. 570); *Nichols v. Martin* (35 Hun, 168) distinguished.

Also, *held*, that plaintiffs were not required to return the goods on discovery of the breach, but had the right to retain them and seek their remedy upon the warranty.

(Argued June 4, 1889; decided June 11, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 4, 1886, which affirmed a judgment in favor of plaintiffs, entered upon the report of a referee against the defendant.

The nature of the action and the facts are sufficiently stated in the opinion.

A. Blumenstiel for appellant. An agent is not liable for acts done as such on behalf of the principal when the party deal-

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ing with him knows that he is treating with him as an agent and not as principal, provided that it does not appear that the agent exceeded his authority. (*Buck v. Amidon*, 4 Daly, 126; *Simmons v. More*, 100 N. Y. 143; *Kirkpatrick v. Stainer*, 22 Wend. 244; *Waite v. Borne*, 7 St. Rep. 113, 115, 117; *Bliss v. Bliss*, 7 Bos. 339, 345, 346; *Judson v. Stilwell*, 26 How. Pr. 513, 523; *Nichols v. Martin*, 35 Hun, 168-171.) An agent authorized to sell may warrant the property and bind his principal in such respect by his declaration. (*Ahern v. Goodspeed*, 72 N. Y. 108; *Kirkpatrick v. Stainer*, 22 Wend. 244.) An agent acting within the scope of his authority, and disclosing his agency, will not be personally bound unless upon clear and explicit evidence of such an intention. (*Hall v. Lauderdale*, 46 N. Y. 70, 74; *Meeker v. Claghorn*, 44 id. 349.)

James A. Dennison for respondents. The factor who sells goods to the purchaser without disclosing the name of the principal for whom he sells, is liable upon the contract so made as principal. (*Jemison v. Citizens' Savings Bank*, 44 Hun, 412; *Hogan v. Sharp*, 24 Wend. 458; *Cobb v. Knapp*, 71 N. Y. 348; *Dean v. Van Nostrand*, 33 A. L. J. 150; 3 R. S. [7th ed.] 2258, § 3.) It was not necessary that the plaintiffs should return, or offer to return, the goods upon discovering that they did not accord with the representations as to their condition and quality made by the defendant, in order to recover in this action. (*Muller v. Eno*, 14 N. Y. 597; *Beeman v. Banta*, 10 N. Y. S. R. 325; *Kent v. Friedman*, 17 Week. Dig. 484; *Dounce v. Dow*, 57 N. Y. 16; *Parks v. M. A. & T. Co.*, 54 id. 586; *Brigg v. Hilton*, 99 id. 517.) Custom or usage cannot prevail where it would contravene any established rule of law or conflict with the contract made by the parties themselves. (*Simmons v. Law*, 3 Keyes, 217; *Thompson v. Riggs*, 5 Wall, 663-680; *Dykers v. Allen*, 7 Hill, 497.)

BRADLEY, J. This action was brought to recover damages alleged to have been sustained by breach of warranty in the sale by the defendant to the plaintiffs of a quantity of antelope skins, and the plaintiff recovered. The defendant was a com-

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mission merchant in the city of New York. The sale in question was in the line of his business, and made by him as such merchant. The referee found that the warranty was made by the defendant that they were a sound, choice lot of Indian, handled skins, free from damage by worm-cut; and that there was a breach of such warranty. The evidence on the part of the plaintiffs tends to prove those facts, and for the purpose of this review they must be deemed established. The main contention on the merits on the part of the defendant is, that he was not liable because the sale was made by him as agent of his consignors of the property sold. Upon that subject the referee found that the defendant did not sell the skins upon his own account, but as commission merchant, and that the plaintiffs knew that he was acting as an agent only, and that his commission was five per cent. The referee, however, determined that the warranty was the undertaking of the defendant, and that he was charged with liability by its breach. The general rule is that an agent employed to do an act is deemed authorized to do it in the manner in which the business intrusted to him is usually done, and such is the presumed limitation upon his power to act for his principal. (*Easton v. Clark*, 35 N. Y. 225; *Smith v. Tracy*, 36 id. 79; *Upton v. Suffolk Co. Mills*, 11 Cush. 586.) While the defendant dealt in the property of others, for whom he made sales, his business of commission merchant was his own. He undertook to sell the goods sent to him for this purpose, and to account to his consignors for the proceeds, less his commission. As between him and them, without any special instructions or authority, it would seem to be inferred that he should sell the goods as they were. And it is difficult to find in such case any implication of power, derived from them, to undertake that the goods were in any respect other or different than they, in fact, were. Unless the character or quality of the goods consigned to him is communicated by the consignors, it is the business of the commission merchant to ascertain what they are in that respect, and put them upon the market only as such; and when he goes beyond

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that he is not, as between him and his principal, within the authority presumptively conferred by the latter upon him. It does not appear that those parties, from whom the defendant received the property in question for sale, gave him any description of the quality or condition of it, or that he acted otherwise than upon his own knowledge or judgment in that respect in making the sale and warranty; nor is it found that he had authority from his consignors to warrant it. But there was some evidence given, on the part of the defendant, to the effect that it was the custom in the trade of commission dealers not to warrant goods sold. While the purpose of such evidence was to bear upon the fact whether any warranty was made, and in support of his proof that none was made in this instance, it also went further and may have been treated as bearing upon the question of the presumption of authority from his principal. If the custom of such dealers was to sell goods as they were and solely upon the inspection and risk of the purchasers, it is certainly difficult to see how any authority from the defendant's principals to warrant, could presumptively arise to relieve him from personal liability for such undertaking made by him to the plaintiffs.

The conclusion was, therefore, permitted that the defendant's relation to the warranty and its consequence was not qualified by his agency, pursuant to which he made the sale to the plaintiffs.

The defendant did not inform the plaintiffs, nor were they in any manner advised, of the name or names of the party or parties who sent the skins to the defendant to be sold by him. The question is presented whether the fact that the defendant failed to give the plaintiffs such information, was sufficient to deny to him the right to make his agency effectual as a defense. It does not appear that the plaintiffs had any knowledge of the names of the consignors of the property, or that the defendant supposed they had such knowledge. In such case there is some reason to conclude that the defendant intended to make the warranty his own as between him and the purchasers. And the proposition that

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an agent contracting in his own name, and failing to disclose the name of his principal at the time of making a contract for the sale or purchase of goods, is personally liable for whatever obligation may arise out of the contract, has the support of authority. (*Mills v. Hunt*, 17 Wend. 333; *Morrison v. Currie*, 4 Duer, 79; *Cobb v. Knapp*, 71 N. Y. 348; *Ludwig v. Gillespie*, 105 id. 653; *Jemison v. Citizens' Sav. Bk.*, 44 Hun, 412.) That doctrine is applicable to the present case. The defendant made the contract of sale in his own name, as commission merchant, without disclosing the name of any principal; and his warranty given to produce it may, within that rule, as between the parties, be deemed his undertaking. In such case it may be supposed that a purchaser relies upon the responsibility of the person with whom he deals for the performance of the contract, and that he is not required to look elsewhere to obtain it. When there is, in fact, a principal the agent may ordinarily relieve himself from personal liability, upon a contract made in his behalf, by disclosing his name at the time of making it. Upon such disclosure, however, the party proceeding to deal with the agent may or may not, as he pleases, enter into contract upon the responsibility of the named principal, but to permit an agent to turn over to his customer an undisclosed and, to the latter, unknown principal, might have the effect to deny to the customer the benefit of any available or responsible means of remedy or relief founded upon the contract. The rule is no less salutary than reasonable that an agent may be treated as the party to the contract made by him in his own name, unless he advises the other party to it of the name of the principal whom he assumes to represent in making it where that is unknown to such party.

This proposition is not inconsistent with the general rule that an agent, acting within the scope of his authority with a party advised of his agency, will not be personally charged unless it appears that such was his intention. (*Hall v. Lauderdale*, 46 N. Y. 70.) The disclosure of his agency is not completely made unless it embraces the name of the principal; and

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without that the party dealing with him may understand that he intended to give his personal liability and responsibility in support of the contract and for its performance. The cases cited by the defendant's counsel, having relation to the right of set-off in behalf of a person who has dealt with an agent, whose agency was unknown to such person, have no necessary application to the question now here. In those cases the question arose between the principal and the party dealing with the agent, without any knowledge of his agency, and upon the faith that he was dealing on his own account in selling property in his possession and of which he, apparently, was the owner. And in such cases the right of the party, purchasing property of the agent, to set off a claim against the latter, in an action brought by the principal, is dependent upon not only want of actual knowledge of the agency, but of circumstances which would direct a prudent man to inquiry and information of the fact, or furnish him reason to believe that he was dealing with an agent. (*Wright v. Cabot*, 89 N. Y. 570; *Nichols v. Martin*, 35 Hun, 168, and cases there cited.) This rests upon the principle that where one of two innocent parties must suffer loss, it should fall on him who has furnished the means and opportunity to another to do that which is done by the latter to cause it. The contract of sale was an executed one, and while the return of the property to the defendant may have been a suitable manner of amicably adjusting the matter, the plaintiffs were not legally required to do so. After the skins were purchased by and delivered to them, the plaintiffs had the right to retain them, and seek their remedy founded upon breach of the warranty. Nor is it seen how that right is qualified, as applied to this case, by the fact that the defendant was dealing with the property of others to whom he was required to account for the proceeds of sales made by him. He was, soon after the sale, advised of the claim of the plaintiffs for damages on account of the impaired condition of the skins; and if the defendant, as between him and his consignors, acted within the authority derived from them in making the warranty, he had the opportunity of seeking indemnity in

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some manner before he paid over such proceeds to his principals. It is deemed unnecessary to advert more fully to the evidence in support of the facts found by the referee, as it does not appear that the case contains all the evidence. (*Porter v. Smith*, 107 N. Y. 531.)

We have examined all the exceptions taken by the defendant on the trial, and to the conclusions of fact and law of the referee, and find no error in any of the rulings to which they were taken.

The judgment should be affirmed.

All concur, except PARKER, J., not sitting.

Judgment affirmed.

WILLIAM F. O'ROURKE, Appellant, *v.* JOHN I. HADCOCK,
Respondent.

When a mortgagee, holding a mortgage upon several chattels, continues to sell after he has realized sufficient to pay the debt and costs, he becomes a trespasser.

Where several distinct chattels are sold upon condition that the title shall not pass to the vendee until the agreed price is paid, and the vendor, in affirmation of the contract, seizes the chattels for the avowed purpose of selling them and collecting the amount due, he has no right to seize and sell or retain more than is sufficient to satisfy his demand and expenses.

Where an executory contract for the sale of chattels provides that the purchase-price shall be paid in installments, and that title shall not pass until the price is fully paid, and the vendor permits the vendee to retain possession and make other payments, after the whole contract-price is due, he may not seize the property and terminate the contract for non-payment until he has demanded payment.

Plaintiff contracted to sell to defendant a canal boat and furniture, and four mules with their harnesses, on credit, the purchase-price to be paid in installments. The contract provided that defendant was to have immediate possession, but that title to the boat should not pass until the purchase-price was paid. To secure the payment defendant executed to plaintiff a mortgage upon another canal boat. Subsequently, and after the whole purchase-price became due, plaintiff took possession of the mules and advertised them for sale, together with the boat sold with its furniture; and on the same day, by separate notice, advertised the other boat for sale under and by virtue of the chattel mortgage, and then

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brought this action to recover possession of the two boats, their furniture, etc. These were seized by the sheriff and delivered by him to plaintiff, who sold them pursuant to said advertisements. The four mules and their harnesses were worth more than the balance of the purchase-price unpaid to plaintiff. *Held*, that the action of plaintiff was an election to affirm the contract and collect the amount due upon it and that judgment was properly rendered against the plaintiff for the value of the mules, less the amount unpaid; also, for the value of the use, and damages for the detention of the two boats; also for their value in case a return could not be had.

It appeared that defendant had commenced an action against plaintiff for an accounting, claiming that the purchase-price had been paid and asking that the notes given for the purchase-price, the chattel mortgage and contract be surrendered, and that defendant be restrained from selling the property described in the contract and mortgage. On trial of said action the referee found that the plaintiff was still indebted to the defendant in the sum of \$126.98 and directed a dismissal of the complaint. Judgment was entered pursuant to the report. *Held*, that the judgment-roll was conclusive evidence in this action as to the amount unpaid.

(Argued May 1, 1889; decided June 18, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made April 20, 1886, which affirmed a judgment in favor of the defendant, entered upon the report of a referee.

On the 31st day of May, 1873, the plaintiff was the owner of the canal boat "Jay Pettibone," its tackle and furniture and four mules and their harnesses, then used in towing the boat. On that day a written contract was entered into between the parties, by which plaintiff agreed to sell to defendant this property for \$6,000, which the defendant agreed to pay in twelve equal installments, with interest, the last payment falling due November 1, 1875. To secure the payment of these sums defendant gave twelve promissory notes. It was stipulated in the written contract that defendant should have immediate possession of the property, but that title to the boat should not pass from the plaintiff to the defendant until the purchase-price was paid, but the contract contains no provision in respect to the mules and their harnesses. At the date named defendant was the owner of the canal boat

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"Dr. M. S. Kittinger," its tackle and furniture. To secure the payment of said \$6,000 the defendant mortgaged the property last mentioned to the plaintiff.

On the 27th of June, 1876, there was an unsettled account between these parties, embracing many items, extending through several years and aggregating more than \$30,000, inclusive of the outstanding notes given by the defendant to the plaintiff for the purchase-price of said boat. At this time a dispute as to the state of these accounts arose between the parties, each claiming to be the creditor of the other. On the day last named the plaintiff advertised that by virtue of the contract and chattel mortgage he would sell the boats by public auction on the 7th of July, 1876, and at the same time seized the "Pettibone" and held possession of it for one day.

July 7, 1876, Hadcock, the defendant herein, began an action against O'Rourke, the plaintiff herein, setting up the existence of the aforesaid executory contract, the promissory notes and chattel mortgage, the open account, and alleged that he had fully paid for the boat, and prayed for an accounting and for a judgment that O'Rourke surrender up the notes, chattel mortgage and contract, execute to him a bill of sale of the "Jay Pettibone," and that he be restrained from selling the property described in the contract and mortgage. An issue was joined in this action, which was referred to a referee, who found that the plaintiff, Hadeock, was still indebted to O'Rourke, the defendant, in the sum of \$126.38, and directed a judgment dismissing the complaint, with costs. December 30, 1881, a judgment was entered pursuant to the report.

July 21, 1876, the plaintiff claimed that the notes, or some part of them, were unpaid, and took from the defendant and converted to his own use, without defendant's consent, said four mules and harnesses. On the next day, July 22, 1876, the plaintiff advertised that he would sell on July twenty-eighth, at ten o'clock A. M., the "Pettibone," her tackle, apparel, furniture and the four mules and their harnesses at public auction by virtue of the executory contract of sale. And on the same day, by a separate notice, advertised that he would sell

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the boat "Dr. M. S. Kittinger," her tackle, apparel and furniture at public auction at the same time by virtue of the chattel mortgage.

July 22, 1876, this action for the recovery of the possession of the two boats, their tackle, apparel and furniture was begun, and on the twenty-fourth of July the sheriff seized the property; and the defendant not excepting to the plaintiff's sureties, nor requiring the return of the chattels pursuant to the Code of Procedure, the sheriff delivered the chattels to the plaintiff. July 28, 1876, the plaintiff sold the "Kittinger" pursuant to his notice of sale under the chattel mortgage for \$800, and the "Pettibone" pursuant to his notice of sale under the executory contract for \$1,500.

This action was referred to the same referee who determined the first action, and he found that, on the 21st of July, 1876, the plaintiff was indebted to the defendant, on account of the executory contract and twelve notes, in the sum of \$126.38. He also found that the four mules and their harnesses were, on July 21, 1876,

Of the value of.....	\$770 00
Deducting from this amount (the remainder due upon the note, from the value of the mules)....	<u>126 38</u>
 Left due from O'Rourke to Hadcock.....	<u>\$643 62</u>

It was found that the value of the "Pettibone" at the time of the trial was.....	\$750 00
That the value of her use and the damages for her detention was....	<u>4, 150 00</u>
	<u>\$4,900 00</u>
That the value of the "Kittinger" at the time of the trial was.....	\$650 00
And the value of her use and the damages for her detention was....	<u>3, 350 00</u>
	<u>4,000 00</u>
Total.....	<u><u>\$8,900 00</u></u>

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Judgment was directed for \$8,500, the value of the use and the damages for detention of the two boats, and for the return of the two boats, but in case a return could not be had, for \$1,400, their value, which was entered in accordance with this report, with costs.

Further facts appear in the opinion.

J. M. Humphrey for appellant. Replevin may be maintained against the purchaser to obtain the possession of goods sold to him on conditions which he has failed to fulfill. (*M. S. Co. v. Emanuel*, 12 N. Y. S. R. 134; *Russell v. Minor*, 22 Wend. 659; *Palmer v. Hand*, 13 J. R. 434.) On default in payment plaintiff's title to the property became absolute and he could maintain an action for its possession as his absolute property. All legal right of the defendant (mortgagor) was gone; his only interest was an equitable right of redemption. (*Halsee v. Walter*, 34 How. Pr. 388; *Burdic v. McVanner*, 2 Denio, 170; *Fuller v. Acker*, 1 Hill, 475; *Dane v. Mallony*, 16 Barb. 49; *Charter v. Stevens*, 3 Denio, 33; *Chamberlain v. Martin*, 43 Barb. 607; 2 Wait on Actions and Defenses, 179; *Patchin v. Pierce*, 12 Wend. 61; *Connors v. Carpenter*, 28 Vt. 237; *Flanders v. Barstow*, 18 Me. 357; *Brown v. Bennett*, 8 J. R. 49; *Langdon v. Buel*, 9 Wend. 80; *Halsted v. Swartz*, 46 N. Y. 289; 46 How. Pr. 291; *Campbell v. Burch*, 60 N. Y. 214; *Hall v. Ditson*, 55 How. Pr. 29; *Stoddard v. Dennison*, 2 Sweeny, 54.) In this action the right to the possession of the property at its commencement is alone involved. The judgment in this class of actions determines that alone. It does not prevent another and different actions to settle other rights the parties may have in it then or subsequently. (*Deyoe v. Jameson*, 33 Mich. 94; *Moulton v. Smith*, 32 Me. 406; *Bush v. Lyon*, 9 Cow. 52; *Redman v. Henchkins*, 1 Sandf. 32; *Ragen v. Arnold*, 12 Wend. 30; *Charter v. Stevens*, 3 Denio, 33; *Bragelman v. Dane*, 69 N. Y. 70; 3 Denio, 33.) The receiving in evidence of the judgment-roll in the action of *Hadcock v. O'Rourke*,

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and also the report of the referee therein, was error. (Code, § 1209; *Coit v. Beard*, 33 Barb. 351; *Dexter v. Clark*, 35 id. 271; *People v. Vilas*, 36 N. Y. 463; *People ex rel. v. Johnson*, 38 id. 63; *Bostwick v. Abbott*, 40 Barb. 335; *Wheeler v. Buckman*, 51 N. Y. 391; 35 How. Pr. 350; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216.) A nonsuit is equivalent to a dismissal under the Code, and no bar, unless it affirmatively appears that it was granted upon a determination of the merits. (*Cambell v. Consales*, 40 Barb. 509; 25 N. Y. 613; *Sweet v. Tutt'e*, 14 id. 465; *Canhope v. Parke*, 11 N. Y. S. R. 300.)

George J. Sicard for respondent. An instrument of the character of this agreement will not be supported as a conditional sale where the intention of the parties is manifest. (*Smith v. Lynes*, 5 N. Y. 41; *Wait v. Green*, 36 id. 556; *Ballard v. Burgett*, 40 id. 314; *Bean v. Edge*, 84 id. 510; *Dows v. Kidder*, Id. 121; *Parkes v. Baxter*, 86 id. 587; 24 Alb. L. Jour. 226, 264; *Marvin Safe Co. v. Norton*, 57 Am. Rep. 576.) The whole question of whether or not this instrument shall be treated as a chattel mortgage is a question of intention of the parties. (Jones on Mort. §§ 258, 263, 265, 279, 325; *Smith v. Crosby*, 47 Wis. 160; *Lane v. Shears*, 1 Wend. 433; Benj. on Sales, §§ 562, 564; *Lord v. Belknap*, 1 Cush. 284; *Robinson v. Cropsey*, 2 Edw. Ch. 138.) There had been no proper forfeiture of the contract, because the defendant Hadcock had been allowed to retain possession of the boat and other property after the last note became due in the fall of 1875, and O'Rourke had received payments upon the indebtedness after the said date. In order to seek a forfeiture O'Rourke should have claimed it when the last note became due and was not paid. (*Hutchings v. Munger*, 41 N. Y. 158; *Cushman v. Jewell*, 7 Hun, 529; *West v. Crary*, 47 N. Y. 423; *Lees v. Richardson*, 2 Hilton, 164; *Bissell v. Bissell*, 4 N. Y. Week. Dig. 338; *Lawrence v. Dale*, 3 Johns. Ch. 23; *Van Loan v. Willis*, 13 Daly, 281; *Preston v. Whitney*, 23 Mich. 267.) The obligations of the seller and buyer are concurrent conditions, and

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the former is bound to exact the performance of the condition either at the time when he first has the right to claim such performance, or within a very short time afterwards, or he will be deemed to have waived it. (*Hennequin v. Sands*, 25 Wend. 641; *Mills v. Halleck*, 2 Edw. Ch. 652; *Lupin v. Marie*, 6 Wend. 77; *Furniss v. Hone*, 8 id. 247; *Lees v. Richardson*, 2 Hilton, 164; *Wright v. Pierce*, 4 Hun, 352; *Osborn v. Gantz*, 60 N. Y. 542.) The acts of O'Rourke in the proceedings taken by him in July, 1876, to enforce the conditions of sale were entirely inconsistent with any intent on his part to enforce such conditions and avoid the sale. Such acts amounted to a waiver of the conditions, and his intent may legally be inferred from the acts of the parties. (*Titus v. Glens Falls Ins. Co.*, 81 N. Y. 419; Benj. on Sales, § 562; *Lane v. Shears*, 1 Wend. 433; *Smith v. Crosby*, 47 Wis. 160; Jones on Mort. § 258; *Van Loan v. Willis*, 13 Daly, 281.) When plaintiff, after the sale, arranged for the transfer of the property, he exercised a right which the contract did not confer upon him in case of forfeiture thereof; but which was given to him if the agreement in evidence was designed and intended simply as a mortgage security for the payment of the notes. Those acts were, therefore, a recognition of the validity of the agreement as a mortgage only. (*Titus v. Glens Falls Ins. Co.*, 81 N. Y. 418.) Acts of a party which influence and are calculated to lead another into a line of conduct which the latter adopts, and which must be prejudicial to his interests, constitute an equitable estoppel. (*Brown v. Bowen*, 30 N. Y. 519; *Plumb v. Catt. Co. Ins. Co.*, 18 id. 392; Bigelow on Estoppel.) The design to mislead is not essential; if the act is calculated to mislead, and the party interested acts thereon and is prejudiced, it is enough to make out equitable estoppel. (*Brookman v. Metcalf*, 34 How. Pr. 429; *M. and T. Bank v. Hazard*, 30 N. Y. 226.) A judgment between the same parties is conclusive, not only as to the grounds covered by it and as to all questions necessarily involved therein, and all facts necessary to support it, but also as to every other matter or thing within the purview of the original action, either as

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matter of claim or defense, and which might have been litigated and decided as essentially connected with the subject-matter of such action. (Abbott's Trial Ev. 826, 832; *Jordan v. Van Epps*, 85 N. Y. 428; *Blakely v. Colder*, 15 id. 617; *Patrick v. Shaffer*, 94 id. 424; *Pray v. Hegeman*, 98 id. 351.) The taking of the mules and harness by O'Rourke, and their value being established, the rule as laid down by the decisions would require that O'Rourke should credit upon the debt the value of said property, thus extinguishing the indebtedness of Hadcock. (Jones on Mort. § 702, 773; *Charter v. Stevens*, 3 Denio, 33; *Bragelman v. Dane*, 69 N. Y. 69; *Montgomery v. Lee*, 10 N. Y. S. R. 119; *Case v. Broughton*, 11 Wend. 106; *Craig v. Tappan*, 2 Sandf. Ch. 78, 90; *Spencer v. Harford*, 4 Wend. 385, 387; *Morgan v. Plumb*, 9 id. 292; *Stearns v. Marsh*, 4 Denio, 227; *Pulver v. Richardson*, 3 T. & C. 436; *Stoddard v. Dennison*, 7 Abb. Pr. [N. S.] 316; *Olcott v. T. R. R. Co.*, 27 N. Y. 565; Boone on Mort. § 273; *Coe v. Cassidy*, 72 N. Y. 138; *In re Haake*, 2 Sawyer, 231.) The value of the canal boats must be fixed by the referee, and also the damages to be recovered by the defendant for the detention of such boats, and judgment must be for such return and such damages. (Code, §§ 1722, 1726, 1730.) The value of the use of the boats during the period of detention is a proper measure of damages to be awarded in addition to the value of the boats at the time of trial. (Code, § 1730; *Allen v. Fox*, 51 N. Y. 562, 565; *Clinton v. Townsend*, 1 T. & C. 330; *Slocum v. Delano*, 17 Week. Dig. 207; *Keep v. Kauffman*, 38 Super. 476; *Yandle v. Kingsbury*, 22 Am. Rep. 282; *Washington Ice Co. v. Webster*, 62 Me. 341, 362.) The referee's findings as to the value of the use of the boats being within the range of the testimony will not be now disturbed. (*Wright v. Saunders*, 65 Barb. 214; *Murtha v. Curley*, 12 Abb. N. C. 12.)

FOLLETT, Ch. J. The referee by his decision, in effect, finds that the plaintiff elected to affirm the contract of sale and collect the amount due upon it. The plaintiff's conduct was

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entirely consistent with this theory, and utterly inconsistent with the plaintiff's present theory, that he disaffirmed the contract of sale and relied upon his title reserved by the contract. The plaintiff advertised that, by virtue of the contract and chattel mortgage, he would sell by public auction, July 7, 1876, all of the property described in these instruments, and again, that he would sell the property by public auction by virtue of the contract and mortgage, July 28, 1876, and on the day last named he did sell all of the property (he having acquired possession of it through this action), except the mules and their harnesses. The plaintiff called Mr. Davis as a witness, who testified that he attended the sale as attorney for the plaintiff and that the plaintiff was present. He also testified: "Both boats were sold within half an hour; the 'Pettibone' was sold first; I recall it because the 'Pettibone' was the original security, and the 'Kittinger' was sort of a collateral; after the sale of the 'Pettibone,' I recall that I asked Mr. O'Rourke to give me the amount of his claim, and Mr. Anthony, who had kept the books for Mr. O'Rourke, gave me the amount of claim, a statement; then I directed the sale of the 'Kittinger' upon the information that the 'Pettibone' had not sold for enough to satisfy the claim; I gave that direction." It is apparent that the plaintiff did not avail himself of his right to rescind the sale and repossess himself of the property described in the contract by virtue of his legal title, in case any part of the price was unpaid; but he elected to collect the sum which he claimed to be due, and he thereby affirmed the sale. Had he disaffirmed the sale he could not have legally done more than to retake the property sold. But, instead of doing only this, he enforced the chattel mortgage and the contract for the avowed purpose of collecting his debt. It is well settled that when a mortgagee holding a mortgage upon several chattels continues to sell after he has realized enough to satisfy the debt and costs he becomes a trespasser. So when several distinct chattels are sold upon condition that the title shall not pass from the vendor to the vendee until the agreed price is paid, and the vendor, in affirmation of the con-

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tract, seizes the chattels for the avowed purpose of selling them and collecting the amount due upon the contract, he has no right to seize and sell or seize and retain more than is sufficient to satisfy his demand and expenses. The plaintiff asserted in his notice of sale that he would sell the mules and their harnesses to satisfy his claim; and, though the title to them was not reserved by the contract, we think he is now estopped from saying that his act was not by virtue of the contract and for the purpose of collecting his debt, but was wholly wrongful. But it is said that the case does not show that the mules and their harnesses were sold. The only evidence upon this subject was given by Davis, who testified:

"The mules were not sold at this time (July 28, 1876), nor were the harnesses." The trial of this case was not concluded until March 3, 1884, more than seven years after the plaintiff took the mules and their harnesses. He was examined but did not explain what he had done with this property; and the evidence justified the referee in finding either that the property had been sold or its condition so changed that he was liable to account for its value by way of application as a payment upon the very debt which he sought to collect by taking the property, and by this action, arising out of the very contract, by virtue of which they were taken. When an executory contract for the sale of chattels provides that title shall not pass until the agreed price is fully paid, which is payable in installments, and the vendor permits the vendee to retain possession and make other payments after the whole contract-price is due, the vendor cannot seize the property and terminate the contract for non-payment until he has demanded payment of the vendee. (*Hutchings v. Munger*, 41 N. Y. 155.) There is no evidence in this case that the plaintiff demanded payment of the defendant. Davis testified that he demanded the boats and property covered by "these mortgages," which the defendant denied. The referee did not find whether possession of the boats and their furniture was demanded, but he did find that the plaintiff took the mules and their harnesses without a previous demand.

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The judgment-roll in the first action between these parties was evidence of the amount due from the defendant to the plaintiff. This amount was the subject litigated in the action. The record shows that the judgment was rendered on the merits, and so it became conclusive between the parties. (Code of Civil Pro. § 1209.)

The judgment should be affirmed, with costs.

BRADLEY, J. (dissenting). The action is replevin, brought to recover the possession of two canal boats, known as "Jay Pettibone of Buffalo" and "Dr. M. S. Kittinger of Lockport," and their tackle and furniture. The "Pettibone" was the subject of an agreement of May 31, 1873, by which the plaintiff agreed to sell it to the defendant upon payment of a sum represented by twelve promissory notes, made by the defendant to the plaintiff, the last one of which was payable November 1, 1875. And, until full payment, title was reserved to the plaintiff, with the right on default to retake the boat. As a further security for the payment of the notes, the defendant gave to the plaintiff a chattel mortgage on the boat "Kittinger." This action is founded upon the alleged default in payment of the moneys so secured. The agreement gave to the defendant the right to take possession of the boat "Pettibone" and use it. This he did. But the sale was conditional. The right of the defendant was to complete the purchase, and take title by payment, and until then the title remained in the plaintiff. This was the situation produced by force of the agreement. (*Strong v. Taylor*, 2 Hill, 326; *Bullard v. Burgett*, 40 N. Y. 314; *Austin v. Dye*, 46 id. 500.) And unless the defendant was in some manner relieved from the effect of such condition, he acquired no title to the boat. His default in payment, would permit the plaintiff to lawfully take the property from the possession of the defendant. It is contended, on the part of the defendant, that the instrument was or became in its nature a chattel mortgage, because it was treated as such in the use made of it by the plaintiff in filing and refiling it, and in subsequently advertising the boat for

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sale on taking it from the defendant. It is difficult to see in this any such effect upon the character of the agreement, as its terms clearly and unequivocally characterize it as an executory agreement of sale, and the payment of the purchase-price as a condition precedent to the change of title. It is also urged that such condition was waived by the plaintiff, because he did not avail himself of the default in payment of the last note when it became due in November, 1875, but received payments of the defendant from time to time thereafter, and did not seek to take the boat until in July following, when this action was commenced. While that was a waiver of the forfeiture so far as to permit the defendant to complete his payments and perfect title to the boat, it did not have the effect to take the condition from the agreement or to change its character. But by such waiver that right of the defendant was continued until demand and refusal. (*Hutchings v. Munger*, 41 N. Y. 155.) The doctrine of the cases, which go to support the proposition of waiver of a condition in the transfer of property, has relation to the condition upon which delivery of possession is made dependent. (*Hennequin v. Sands*, 25 Wend. 640; *Osborn v. Gantz*, 60 N. Y. 542.) The defendant alleges payment of the notes. The referee has found that on the 7th day of July, 1876, the amount remaining due from the defendant to the plaintiff was \$126.38, and, on the twenty-first day of that month, the plaintiff took from the defendant, without the consent of the latter, four mules and harnesses of the value of \$770, and appropriated them to his own use. This action was commenced the next day, and the property in question taken upon the requisition two days after. And the referee further finds that the notes had been fully paid, and that the plaintiff was then indebted to the defendant \$643.38, the difference between the value of the mules and harness and the amount due the plaintiff when he took them from the defendant. The plaintiff claims, and evidence on his part was given tending to prove, that there was due him upon the notes upwards of \$3,000 at the time of the commencement of the action. The fact, as

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found by the referee in that respect, was based solely upon a record of judgment in an action, between the same parties, brought by Hadcock against O'Rourke on or about July 7, 1876, wherein the former alleged payment of the notes, sought an accounting with O'Rourke and the relief that the accounts between them be stated, and that the latter be restrained from taking the property. The issues were referred and the referee found that, on July 7, 1876, there was due from Hadcock to O'Rourke on the notes \$126.38, and, as conclusion of law, determined that the latter was entitled to judgment dismissing the complaint. The judgment, thereupon entered, in terms, adjudged that the report be confirmed; that the sum so found was due the defendant therein from the plaintiff upon such notes, and that the complaint be dismissed, with costs. By that record there seems to have been a determination upon the merits of the issues presented by the pleadings, in which was directly involved the inquiry into the state of the accounts between the parties with a view to relief or redemption of the property from the alleged right and claim of the defendant therein, founded upon the agreement of sale and mortgage. As a rule, the consequence of a litigation between the same parties is that, when determined upon the merits, it is conclusive as to all matters within the issues, and that such is the effect of the adjudication upon the same questions in a subsequent action between them, although the form or purpose of it may differ from the former action. (*Jordan v. Van Epps*, 85 N. Y. 427; *Pray v. Hegeman*, 98 id. 351; *Castle v. Noyes*, 14 id. 329; *Smith v. Smith*, 79 id. 634; *Leavitt v. Wollcott*, 95 id. 212.) It is contended by the plaintiff's counsel that the only question legitimately involved in the issue for determination in the former action was, whether the notes had been paid, and the property thus relieved from the claim of O'Rourke upon it, and that when Hadcock failed to establish such payment it was the only fact for the referee to find, and the conclusion of law that the complaint be dismissed necessarily followed. But we think the issues presented by the

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pleadings, and the purpose of the former action, may be deemed to have been broader than that, and to have embraced the inquiry, which was litigated, as to the situation of the claim and amount unpaid upon it. The plaintiff in that action at the time of its commencement, so far as appears, had the right to pay whatever remained due, and perfect his title to the boat "Pettibone" and redeem the other from the operation of the mortgage. If he had tendered to O'Rourke a sum equal to the amount so found due, and the fact had so appeared on the trial of that action, the referee could properly have directed judgment for him. And if the situation had been such as to render it practicable for Hadcock to do so, and relieve the property from the claim, we think he might, for the purpose of payment, have treated the adjudication founded upon such report of the referee as effectually fixing the amount required to perfect and restore his title to the property. This was within the purpose expressed in the complaint. The issues related to the amount paid and unpaid upon the notes, as well as to the alleged fact of payment. In this respect the present action may be distinguished from *Campbell v. Consalus* (25 N. Y. 613), where the only question for determination within the issues was, whether the mortgage sought to be canceled had been paid. The considerations of economy, as well as policy, require that repose be given to controversies between parties as to matters within issues, which have been once litigated and legitimately determined upon the merits, while the adjudication remains unreversed and unvacated. Otherwise parties might be subjected to hardship and embarrassment. The doctrine of *res adjudicata* is not, however, applicable to matters merely collateral or incidental to the questions presented by the pleadings and litigated, although they are the subject of controversy on the trial. (*People v. Johnson*, 38 N. Y. 63.) The plaintiff in the former action having alleged his readiness to pay any sum found remaining due the defendant therein, the referee could properly have directed judgment, giving leave to the former to pay the amount so found unpaid in satisfaction of the notes. But his omission to do so, inas-

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much as the complaint was dismissed on the merits, did not deny legitimate and conclusive effect to the finding of fact within the issues and declared by the judgment. (*People v. Smith*, 51 Barb. 360; *Steinbach v. Relief Fire Insurance Co.*, 77 N. Y. 498.) And the fact that the dismissal was on the merits is not dependent upon an express declaration to that effect by the referee. It is sufficient that it so appears by the judgment record. (Code Civ. Pro. § 1209; *Van Derlip v. Keyser*, 68 N. Y. 443.) Treating, as we do, the former adjudication as determining the amount due the plaintiff herein, the inquiry arises whether such amount was paid. The report of the referee indicates that he treated the taking and appropriating by the plaintiff of the mules and harness as a satisfaction of the plaintiff's claim. It is not seen how the taking and appropriation of that property as represented by the evidence could be given such effect. If the defendant's right to take title to the mules and harness was subject to the same condition as that relating to the boat "Pettibone," the plaintiff may, by reason of the default, have had the right to reclaim them as his property. But it is by no means clear that he had by the agreement reserved the title to that property in himself, or that he had the right to take it. The agreement does not, in terms, apply the condition to the sale of the mules and harness. And, assuming that it was not applicable to them, the title to that property passed on delivery of it to the defendant. Upon that assumption, the plaintiff became liable for the conversion of that property when he took and appropriated it to his own use without the consent of the defendant. But as it does not appear that he disposed of the property or changed its condition, no opportunity seems to have been furnished the defendant to waive the tort and make any claim against the plaintiff in the nature of assumpsit on account of the property so taken. That right arises out of the disposition of the property tortiously taken or converted. And then the party thus deprived of his property may charge the wrong-doer as for money had and received to his use. (*Sturdevant v. Water-*

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bury, 2 Hall, 484; *Cobb v. Dows*, 9 Barb. 230; *Berly v. Taylor*, 5 Hill, 577; *Osborn v. Bell*, 5 Denio, 370; *Jones v. Hoar*, 5 Pick. 285; *Cushman v. Jewell*, 7 Hun, 525; *Stearns v. Dillingham*, 22 Vt. 624; 54 Am. Dec. 88; *Balch v. v. Patten*, 45 Me. 41; 71 Am. Dec. 526.) It is not unreasonable to suppose that the doctrine may be so extended as to permit the waiver of the tort and the maintenance of an action as for goods sold and delivered, when the wrong-doer has, by using the property for his own benefit, changed its condition and character as held in *Abbott v. Blossom* (66 Barb. 353). But that question does not arise and is not considered here. There is no evidence that the plaintiff did anything with the mules and harness further than to take them into his possession, which he did without the consent of the defendant. Whatever claim the latter appears to have had against the plaintiff for taking that property, was in tort as for trespass or conversion. It is difficult to see that, for the purpose of the question here, the effect, before stated, of taking the mules and harness by the plaintiff was modified by the fact that they, with the boat "Pettibone," were covered by the notice of sale. The taking of them cannot be treated as payment upon the debt unless they were or may be deemed taken as such. There is nothing indicating such purpose on the part of the plaintiff. And, assuming that his purpose, when he caused the notice of sale to be posted, was to sell them, the unaccomplished design to do so did not give to the taking of them the effect of payment. These views lead to the conclusion that it could not be treated as payment or satisfaction of the balance remaining due upon the notes. It follows that, in view of the default in payment, the plaintiff, upon demand and refusal, had the right, at the time of the commencement of this action, to take the boat "Pettibone" by force of the condition in such agreement of sale, or to take the other boat by virtue of the chattel mortgage. But he had no right to take both, because the taking of the former by the plaintiff, as owner, would have the effect to rescind the contract of sale or put an end to it, and this would terminate his

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right to seek payment or to avail himself of the security given for it. The plaintiff did at the same time proceed to take both boats. They were taken together upon his requisition in this action July twenty-fourth and delivered to him July twenty-seventh. On July 22, 1876, he advertised them for sale by separate notices, and sold both of them on the twenty-eighth day of that month. The plaintiff had the legal title to the boat "Kittinger," subject to such right as the defendant had of redemption. (*Mattison v. Baucus*, 1 N. Y. 295.) And the right of the plaintiff was to take it on the mortgage and publicly sell it on notice by way of foreclosure of the equity of redemption, or not sell it, as he pleased. In case of such sale he could account for the net proceeds. And if he did not sell it, the taking and appropriation would operate to satisfy the claim if its value was sufficient for the purpose. (*Case v. Boughton*, 11 Wend. 107; *Charter v. Stevens*, 3 Denio, 33; *Coe v. Cassidy*, 72 N. Y. 133, 138; *Bragelman v. Dause*, 69 id. 69; *West v. Crary*, 47 id. 423.)

When the plaintiff by the action and requisition sought to obtain and did take the boat "Pettibone," he was denied the right to the possession of the other boat for the reason before given. I should be inclined to give the defendant the benefit of the recovery of the "Pettibone" and damages for its detention, as that produced the larger amount, if that were practicable. And, as the defendant did not answer the complaint until after the sale of the "Kittinger," it may be that it could have been done on the ground of satisfaction of the debt by such sale, if the time of payment, as alleged in the answer as a defense, and found by the referee, had not been confined to that before the action was commenced. (*Bendit v. Annesley*, 42 Barb. 192; *Rice v. Childs*, 28 Hun, 303; *Willis v. Chipp*, 9 How. 568; *Carpenter v. Bell*, 19 Abb. Pr. 258; *Beebe v. Dowd*, 22 Barb. 255.) These views lead to the conclusion that the plaintiff was entitled to the possession of the boat "Pettibone," and that the defendant had the right to that of the boat "Kittinger," and to recover it with damages for detention. The value of the property was properly determined as of the time

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of the trial. (*Brewster v. Silliman*, 38 N. Y. 423; *New York Guaranty, etc., Co. v. Flynn*, 55 id. 653.) And the value of the use of the boat, adopted as the measure of damages for its detention, was in accordance with the rule in that respect announced in *Allen v. Fox* (51 N. Y. 562).

The judgment, therefore, should be reversed and a new trial granted, costs to abide event, unless the defendant stipulate that the judgment entered upon the report of the referee be modified by striking from it so much as awards the return to the defendant of the boat "Pettibone" and damages for its detention, and by inserting a recovery by the plaintiff of the possession of that boat. And in case the defendant so stipulates, the judgment in other respects, and so modified, be affirmed, without costs of this appeal to either party.

All concur with FOLLETT, Ch. J., except BRADLEY, J., dissenting, and HAIGHT, J., not voting.

Judgment affirmed.

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CARR & HOBSON (Limited), Appellant, v. ANNA J. A. STERLING, Respondent.

In an action upon an undertaking alleged to have been given to secure the release of one H. from an order of arrest issued in a civil action brought in the Superior Court of the city of New York, the complaint alleged that the undertaking was executed and accepted under an agreement that, upon its execution, H. should be discharged from arrest, defendant agreeing to fully perform and abide by its terms. Said undertaking was entitled in the Supreme Court, and did not conform to the provision of the Code of Civil Procedure (§ 575), and plaintiff claimed to recover upon it, not as a statutory undertaking, but as an agreement valid at common law. Held, that, treating the undertaking as an agreement, the mistake in the entitling was not available; that no particular form was necessary, nor was it necessary that it should be entitled, and so the words "Supreme Court" might be treated as surplusage; and that this action was maintainable. The complaint in the action, in which the order of arrest was issued, demanded judgment for \$7,000 and interest. The defendant did not appear. The complaint was amended *ex parte* at Special Term so as to demand judgment for \$18,618.66, with interest. Judgment was thereafter entered for that amount. Held, that, conceding H. was entitled to notice of the motion to amend the complaint, the failure to

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give it was an irregularity merely which could be corrected on motion, but would not operate to render the judgment void; that the judgment would stand as valid until set aside or amended.

The deputy sheriff testified that he arrested H.; told him the amount of bail required, and that he and H. went to see the defendant herein; that H. asked her if she would go on a bond and she replied she would; that the witness and H. then went to the house of L., the attorney in the action against H., and the bond was partially filled out; they then returned to the defendant, who signed the bond; she asked if she would be sufficient, and was told that L. said she would; that they then returned to L.'s house; he approved the bond, and thereupon H. was discharged. The defendant herein did not see plaintiff or his attorney before signing the bond. *Held*, that the evidence was sufficient to establish an agreement between defendant and plaintiff.

Execution against the body of H. was not issued until a year and a half after the return unsatisfied of the execution against his property. H. could not then be found. He had remained in the vicinity for a long time after entry of the judgment. It appeared, however, that defendant had requested plaintiff's attorney not to press or pursue H. in the matter, and he swore that this was the reason for the delay in issuing the body execution. *Held*, that any laches on the part of plaintiff was excused.

Toles v. Adeo (91 N. Y. 562; *S. C.*, 84 id. 222) distinguished,

Carr & Hobson v. Sterling (21 J. & S. 255) reversed.

(Argued June 8, 1889; decided June 18, 1889.)

APPEAL from judgment of the Superior Court of the city of New York, entered upon an order made May 3, 1886, which overruled exceptions taken at the trial and directed a judgment for defendant.

The nature of the action and the facts are sufficiently stated in the opinion.

Norman T. M. Melliss for appellant. The undertaking given on the discharge of the prisoner Holt resolves itself into an assumpsit at common law. (*Toles v. Adeo*, 84 N. Y. 222; *S. C.*, 91 id. 562.) The validity of the undertaking as a technical bail bond was, therefore, not necessary. (*Ryan v. Webb*, 39 Hun, 435.) The objection that the undertaking sued on is entitled in the Supreme Court, whereas the plaintiff pleaded the giving of an undertaking in an action in the Superior Court, is entirely technical and was properly overruled. (*Bensel v. Lynch*, 44 N. Y. 162; *Douglass v. Habestro*, 88 id. 611.) The fact that judgment in the suit against Holt

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was taken by default, and for a larger amount than the complaint demanded, did not render the judgment itself or the executions based upon it void, but merely irregular; at all events, the defendant in this suit could not attack such judgment or executions in this suit collaterally. (*Jewett v. Crane*, 35 Barb. 208; *Bensel v. Lynch*, 44 N. Y. 162; *Peck v. N. Y. & N. J. R. R. Co.*, 85 id. 246.) The question of laches should have been submitted to the jury. (*Toles v. Adeo*, 84 N. Y. 241; *S. C.* 91 id. 562, 573.)

L. Lafin Kellogg for respondent. The instrument sued upon as a statutory bond or obligation is void, for the reason that it was executed by only one surety. (Code of Pro. § 575; 3 R. S. [ed. 1875] 448, §§ 49, 59.) Any undertaking taken by the sheriff in excess of or not in conformity to the provision of the statute is null and void. (*Cook v. Fraudenthal*, 80 N. Y. 205; *Toles v. Adeo*, 84 id. 234.) The plaintiff is not entitled to recover upon the instrument as a common-law undertaking or agreement, for the reason that no such agreement has been proved. (*Toles v. Adeo*, 84 N. Y. 234.) The plaintiff has been guilty of gross laches in this case which, as a matter of law, would discharge the defendant as surety. (*Toles v. Adeo*, 91 N. Y. 571; *Creary v. Parker*, 40 id. 181; *N. Ins. Co. v. Wright*, 76 id. 445; *McMurray v. Noyes*, 72 id. 523.) A judgment granting relief not demanded in the complaint is not merely irregular, but void or voidable for want of authority in the court to render it. (Code of Civil Pro. § 1207; *Simonson v. Blake*, 12 Abb. 331; *Andrews v. Monilarus*, 8 Hun, 65; *Bartlett v. Holmes*, 12 id. 398; *Hurd v. Leavenworth*, 1 C. R. [N. S.] 278; *Briggs v. Oliver*, 68 N. Y. 336; *Argall v. Pitts*, 78 id. 243; *Peck v. N. Y. & N. J. R. R. Co.*, 85 id. 246.) In case of a lack of jurisdiction in the body to make the decision, the decision may be attacked whenever it is asserted, for if there was no authorized body or court there could be no authorized decision. (*Osterhardt v. Hyland*, 27 Hun, 167; *Lange v. Benedict*, 73 N. Y. 12.) The return of the execution against the person was not prop-

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erly made, and, being a condition precedent to any recovery upon the bond, the complaint was rightly dismissed upon this ground also. (Code of Civil Pro. § 597.) By its conduct the plaintiff concedes that a question of law only is raised. (*White v. Talmadge*, 35 Super. 223; *Winchell v. Hicks*, 18 N. Y. 558; *Seymour v. Cairy*, 1 Keyes, 532: *Provost v. McEncroe*, 102 N. Y. 650.)

HAIGHT, J. This action was brought upon an undertaking executed by the defendant to secure the release of one William W. Holt from an order of arrest issued in a civil action. The undertaking was in the sum of \$7,500, and provided that Holt "shall at all times render himself amenable to any mandate which may be issued to enforce final judgment against him in the action." Final judgment was entered therein on the 27th day of May, 1882, and thereafter and on the 29th day of November, 1882, an execution was issued against the property of the judgment-debtor. Such execution having been returned unsatisfied, an execution against the body of the said judgment-debtor was issued on the 7th day of December, 1883, and was returned by the sheriff with the indorsement thereon, "Defendant not found." Thereafter this action was brought upon the undertaking.

Upon the trial the court dismissed the complaint and ordered the exceptions to be heard in the first instance at the General Term, and in the meantime suspended judgment.

The complaint in this action alleges that the undertaking was executed by the defendant and accepted by the plaintiff, under an agreement that Holt should be released and discharged from arrest, the defendant agreeing to duly perform and abide by the terms and conditions of the undertaking. That pursuant to such agreement, and in consideration thereof, the plaintiff did discharge and release Holt from custody under the order of arrest. The undertaking had but one surety and did not conform to the provisions of the Code, and the plaintiff does not claim the right to recover on it as a

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statutory undertaking ; but does claim the right to recover upon it as an agreement, which is good at common law. The action in which the order of arrest was issued was brought in the Superior Court of the city of New York. The undertaking was entitled in the Supreme Court. It is now claimed that it is void because it is not entitled in the court in which the action was brought. Without stopping to consider the effect that this would have upon a statutory undertaking, we are of the opinion that, inasmuch as it is founded upon an agreement and is sought to be maintained by virtue of the agreement, the defect, if such it be in a statutory undertaking, is not available in this action. There is no obscurity in the agreement in reference to the order of arrest that Holt was to be released from, or the obligation that the defendant undertook upon his being discharged. Treating it as an agreement between the parties no particular form was necessary. It was sufficient if the minds of the parties met and assented to its terms. As an agreement, it was not necessary that it should be entitled, and the words "Supreme Court" at the head thereof have no significance, and may be properly treated as surplusage.

The original complaint in the action, in which the order of arrest was issued, demanded judgment for \$7,000 and interest. The defendant did not appear in the action. Subsequently, on an application to the Special Term, the complaint was amended *ex parte* so as to demand judgment for \$13,618.66, with interest from April 3, 1882, with costs, etc. Thereafter judgment was entered for that amount. It is claimed that this was in violation of section 1207 of the Code of Civil Procedure, which provides that, "Where there is no answer the judgment shall not be more favorable to the plaintiff than that demanded in the complaint." If the judgment is void, then it would not be within the provisions of the agreement, under the terms of which Holt was to render himself amenable to any mandate which may be issued to enforce a final judgment against him in the action. (*Mitnacht v. Kellermann*, 105 N. Y. 468.) But is it a void judgment ? The court had juris-

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diction of the parties and the subject-matter. This was obtained upon the service of the summons and complaint. The amended complaint in the action demanded judgment for the amount for which it was entered. The judgment, therefore, conforms to the provisions of the section of the Code referred to. A party appearing in an action is entitled to notice of the motions subsequently made to the court, but a party not having appeared would not ordinarily be entitled to notice of motion. (*Peck v. N. Y. & N. J. R. R. Co.*, 85 N. Y. 246.) But if it should be held that Holt was entitled to notice of the motion to amend the complaint, the failure to give such notice would be an irregularity merely, which could be corrected upon motion. It would not operate to render the judgment void, but it would stand as a valid judgment of the court until set aside or amended. (*Jewett v. Crane*, 35 Barb. 208; *Bensel v. Lynch*, 44 N. Y. 162-165.) The cases of *Briggs v. Oliver* (68 N. Y. 336) and *Argall v. Pitts* (78 id. 243) are not in conflict with this view. No greater amount can be recovered of her than that stipulated in the undertaking or agreement. And whether she is entitled to be credited with the payments by Holt after the action was brought is not now before us for consideration.

It is contended that there was no common-law undertaking or agreement proved. The evidence upon this branch of the case is undisputed and is substantially as follows: The deputy sheriff, McGonigle, testified that he arrested Holt and immediately afterwards told him the amount of bail that was required, and that afterwards they went and saw Mrs. Sterling, the defendant in this action; that Holt asked her if she would go on a bond, and she said she would if she could be of any use to him; that they then went to Mr. Logan's house, the attorney for the plaintiff in that action, had a talk with him and the bond was partially filled out; they then returned to Mrs. Sterling and she signed the bond. She wanted to know if she would be sufficient, and was told that Mr. Logan said "Yes, that he would accept her;" that they then returned to Logan's house, who approved the bond, and thereupon the sheriff discharged Holt from arrest. It is true that the

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defendant did not see the plaintiff or its attorney before signing the bond, but her willingness to sign was conveyed to the plaintiff's attorney, through Holt and the deputy sheriff, and his consent to accept her was conveyed back to her by the same persons. The undertaking was prepared and she signed it. This appears to be sufficient to establish an agreement. (*Tolles v. Adeo*, 84 N. Y. 222; 91 id. 562; *Goodwin v. Bunzel*, 102 id. 224.)

Again, it is contended that the plaintiff has been guilty of laches, which, as a matter of law, would discharge the defendant as surety. As we have seen, the judgment was entered on the 27th day of May, 1882, and an execution against the property was issued on the 29th day of November, 1882, and that against the body on the 7th day of December, 1883, more than a year and a half afterwards. It appears that Holt remained in the vicinity for a long time after the entry of judgment, and had the execution against his body been issued he could have been taken thereon, but at the time that it was issued he had departed from the county and could not be found. This undoubtedly amounts to laches which would discharge the defendant from liability. (*Tolles v. Adeo*, 91 N. Y. 571; *Craig v. Parkis*, 40 id. 181; *Northern Ins. Co. v. Wright*, 76 id. 445; *McMurray v. Noyes*, 72 id. 523.)

But it is claimed that these laches were excused by the defendant, and this, in our judgment, becomes the important question in the case.

Mr. Logan, the plaintiff's attorney, testified that Mrs. Sterling, the defendant, came to his office and stated that she felt a considerable interest in Mr. Holt. "She said that she requested me to use my influence to help Mr. Holt all that I could, and she spoke to me in regard to getting Mr. Holt back with Carr & Hobson, and I told her I would use my endeavors to do so. She told me she hoped I would not press Mr. Holt or pursue him in that matter. She said that she thought Mr. Holt had fallen. That he had a very nice family. I think she said she thought he had fallen; I don't remember her exact words, but substantially, 'from grace,' I think, by

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accident, and she hoped very much I would not press him or do anything to injure him in this case any further than absolutely necessary, and not to do anything that I could avoid doing." He further testified that he did use his endeavors to have Mr. Holt returned to Carr & Hobson, and that he did not issue the executions upon the judgment sooner than he did, because he desired to do all he could in the matter for Holt, and that he had been beseeched by the defendant not to do anything, but to do all that he could for him, and not press or injure him on that account.

It will be observed that the defendant requested the plaintiff's attorney not to press or pursue Holt in the matter. The only way in which he could be pressed or pursued in that action was by the issuing of the executions against his property and person. The request was, therefore, in effect, not to issue the executions ; and it appears to have been so understood by the plaintiff's attorney, for he testified that the delay in issuing the execution was on account of the request of the defendant. We are of the opinion that this amounted to an excuse for the laches complained of.

In the case of *Tolles v. Adeo* (91 N. Y. 562-572) a similar request had been made by the surety, but subsequently he died, and the court in that case held that it was but a mere notice which could be terminated, and could not be deemed to continue after his death, when new rights intervened and his liability fell on the shoulders of his executors. In that case it was further held that there were laches in not issuing the executions with due diligence after the death of the surety, which operated to discharge his executors from liability. (See, also, same case, 84 N. Y. 222.) It consequently appears to us that a question of fact was presented, which should have been submitted to the jury.

For these reasons the judgment should be reversed and a new trial ordered, with costs to abide event.

So ordered.

All concur.

Judgment reversed.

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LEONARD HANGEN, Respondent, *v.* CHRISTIAN HACHEMEISTER,
Appellant.

Where there is an agreement or understanding between the parties at the time of the execution of a chattel mortgage that the mortgagor may sell or dispose of the mortgaged property or any portion thereof for his own use, the mortgage is void as to the creditors of the mortgagor.

The agreement or understanding may be proved by parol or may be inferred from the fact that the mortgagee permits the sale to be made.

In 1887 one V. R., who was engaged in keeping a saloon in the city of New York, died. The public administrator was appointed administrator of his estate, and as such took possession of and sold the furniture, fixtures, etc., of the saloon to plaintiff, who thereupon took possession and continued the business with the property so purchased. Defendant entered the premises and took away the property so purchased, claiming title thereto under a chattel mortgage executed by the deceased in 1876. The mortgage, by its terms, covered all the goods and chattels in the saloon belonging to the mortgagor, mentioned in a schedule annexed. The schedule enumerated all the furniture and fixtures in the saloon and the stock of wines, ales, liquors and cigars. The mortgage provided that until default in payment the mortgagor was to remain in quiet and peaceable possession of the goods and chattels and the full and free enjoyment of the same. In an action for the alleged conversion of said property there was evidence that the mortgagee had loaned the mortgagor money to carry on the saloon; that the latter continued the business until about the time of his death, conducting it in the usual way; that there were other creditors of the deceased and that he died insolvent. *Held*, that the jury had a right to infer from the facts that it was mutually understood between the parties that the mortgagor should have the right to sell and dispose of the merchandise embraced in the mortgage for and on his own account, and that with this finding the mortgage was void as against creditors; that the administrator represented the creditors as well as the estate, and as such had the right to disaffirm the mortgage.

Evidence was given tending to show plaintiff's receipts from sales made and the expenses each day for two weeks before the property was taken. After it had been received it was objected that no claim was made for such damages. The objection was overruled and an exception taken. *Held*, that the exception was not available here, the objection not having been made in time and no motion having been made to strike out the evidence; also, that the evidence was proper in determining the damages arising from the destruction of plaintiff's business, which was one of the items of damage set forth in the complaint.

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It appeared that a controversy arose as to the validity of the mortgage between the public administrator and defendant's attorney, who had been employed to foreclose it and take possession of the property. Evidence was given tending to show that there was an arrangement between them, by which the property was to be sold and the proceeds retained subject to the determination of the question as to the validity of the mortgage. This was objected to as irrelevant and incompetent. The objection was overruled. *Held*, no error.

Plaintiff was allowed to testify as to the cost of articles purchased by him from other parties than the administrator, which he claimed were taken by defendant, and which had been purchased within three weeks of the sale and, as the evidence showed, had not changed in value, also, as to the amount he paid for the property purchased at the administrator's sale. He had testified, in substance, that he was familiar with such property, had bought and sold it, and for eight years been engaged in the business of keeping a saloon and in buying and selling fixtures and saloons. *Held*, that the evidence was properly received; also, that the witness was competent to express his judgment as to the value of the property.

Defendant requested the court to charge that plaintiff must prove that the mortgagor actually sold, as his stock in trade, property covered by the mortgage and applied the money to other purposes than the mortgage debt. This was refused. *Held*, no error; that the request was incomplete and, as it stood, meaningless, because it did not point out the consequences which would result if the proof was not made; but *held*, that it was the agreement authorizing the mortgagor to sell that vitiated the mortgage, not the fact that a sale was made.

Reported below, 21 J. & S. 532.

(Argued June 5, 1889; decided June 18, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made July 31, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

Henry Daily, Jr., for appellant. When illegal evidence has been admitted against objection, which bears in the least degree on the result, it is fatal. (*Baird v. Gillett*, 47 N. Y. 187, 188; *Worrell v. Parmilee*, 1 Comst. 519; *People v. Wiley*, 3 Hill, 214.) Any evidence bearing on the issue erroneously admitted is ground for a new trial. (*O'Hagan v. Dillon*, 76 N. Y. 170; *Neudecker v. Kohlberg*, 81 id. 304, 305; *Hawley v. Hatton*, 9 Hun, 134.) It was error for the court to charge

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the jury on an assumed state of facts not proved or before him. (*Palmer v. Kelly*, 56 N. Y. 637; *Algeer v. Gardner*, 54 id. 360; *Story v. Brennan*, 15 id. 526; *Small v. Smith*, 1 Denio, 583; *Gale v. Wells*, 12 Barb. 94; *Lakey v. Loomis*, 2 Hun, 516; *Pease v. Smith*, 61 N. Y. 488.)

Richard L. Sweezy for respondent. The case was properly submitted to the jury upon the question as to whether or not the mortgage was fraudulent by reason of an agreement between the mortgagor and the mortgagee, to the effect that the mortgagor might go on and sell the stock of liquors, etc., and appropriate the proceeds to his own use. Such an arrangement or understanding avoids the mortgage as a matter of law. (*Edgell v. Hart*, 9 N. Y. 213; *Russell v. Winne*, 37 id. 591; *Southard v. Benner*, 72 id. 424; *Potts v. Hart*, 99 id. 168; *Hangen v. Hachemeister*, 17 J. & S. 34.) By the statute of frauds a mortgage, not followed by actual and continued change of possession, though filed, is presumptively fraudulent and void as against creditors and purchasers, and it is incumbent upon the mortgagee to establish the good faith of the mortgage and the honesty and propriety of the arrangement whereby the property was left with the mortgagor. (3 R. S. [6th ed.] 143, §§ 5, 9; *Gardner v. Adams*, 12 Wend. 297.) A fraudulent grantee cannot call upon the creditors of his grantor to restore any part of the consideration as a condition precedent to their right to avoid the fraudulent transfer. (*U. N. Bk. v. Warner*, 12 Hun, 306; *Russell v. Winne*, 37 N. Y. 591.) The evidence of what plaintiff paid for the property shortly before it was taken by defendant was proper upon the question of its value. (*Hoffman v. Conner*, 76 N. Y. 121.) If the mortgage was fraudulent and void, the loss sustained by plaintiff during the period necessarily occupied in refitting the place was a proper element of damage. (*Wakeman v. W. & W. S. M. Co.*, 101 N. Y. 205; *Schile v. Brokhahus*, 8 id. 614.)

HAIGHT, J. This action was brought to recover the value of certain personal property, consisting of bar fixtures, gas fix-

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tures, water fixtures, pumps, counters, tables, chairs, glass ware, window shades and other property contained in the saloon at No. 44 Clinton place in the city of New York, which, it is alleged, was wrongfully and unlawfully taken from the plaintiff by the defendant, carried away and converted to his own use; and also for damages for breaking up and injuring the plaintiff's business, reputation and credit.

The defense is that the property was taken by virtue of a chattel mortgage. It appears that, in the year 1877, a young man by the name of George A. Von Rauscher was engaged in conducting a saloon at the place in question, and upon the 19th day of October, 1877, he died; that the public administrator of the city was appointed the administrator of his estate, and as such took possession of his personal property, and thereafter, and on the 27th of October, 1877, sold at public auction the furniture, fixtures and appurtenances of the saloon to the plaintiff for the sum of \$483, who thereupon entered into the possession of the place, and continued the business with the property thus purchased; and about the middle of November thereafter the defendant, who is a member of the firm of George Ringler & Co., entered the premises with a number of men and took and carried away the property in controversy. It further appears that on the first day of November, 1876, Von Rauscher executed to one August Von Rauscher a chattel mortgage upon the wines, liquors, articles of furniture belonging to him, and all other goods and chattels mentioned in a schedule annexed, that was at that time in the saloon at 44 Clinton place, New York, to secure the payment of a promissory note for \$340, payable in one year from date. The mortgage provided that, until default be made in the payment, the mortgagor was to remain and continue in the quiet and peaceable possession of the said goods and chattels and the full and free enjoyment of the same. The schedule annexed enumerated the chairs, tables, counters, bar, fixtures, etc., contained in the saloon, including the stock of wines, ales, liquors and cigars. This mortgage was subsequently assigned to the firm of George Ringler &

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Co., who were the owners of it at the time the property was taken by the defendant.

Upon the trial the plaintiff claimed that the mortgage was fraudulent and void for the reasons, first, that Von Rauscher, the mortgagor, at the time it was executed was an infant under the age of twenty-one years; and, second, that it was executed under an agreement that he should continue in the possession of the property and have the full and free enjoyment of it, with the right to sell and dispose of the wines, ales, liquors and cigars for his own benefit and advantage without applying the proceeds upon the mortgage debt. As to the claim of infancy, the trial court held and decided that it was not established, and only submitted to the jury the question as to whether there was an agreement that the mortgagor was to have the right to sell and dispose of the property mentioned, and to retain the proceeds thereof. The jury found a verdict in favor of the plaintiff for the value of the property taken, thus finding that such agreement was made. In the case of (*Southhard v. Benner*, 72 N. Y., 424), it was held that if, at the time of the execution of a chattel mortgage upon the stock of merchandise, it is understood and agreed between the parties that the mortgagor may sell the stock and use the proceeds in his business, and the agreement is carried out, the mortgagor making the sales with the knowledge of the mortgagee, the transaction is fraudulent in law as against the creditors of the mortgagor. It was further held in that case that such an agreement might be proved by parol, or inferred from the fact that the mortgagee had permitted the sales to be made.

In the case of *Potts v. Hart* (99 N. Y. 168), it was held that the mortgage would be void when it is given with a tacit understanding that such sales may be made; and in the case of *Russell v. Winne* (37 N. Y. 591), it was held that an agreement that the mortgagor may remain in possession and sell or dispose of the mortgaged property for his own use, rendered the mortgage fraudulent as to creditors, whether the agreement be contained in the instrument or was independent of it,

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and that if it was void as to a part of the chattels covered by it, it was void as to the whole.

The wines, ales, liquors and cigars constituted the stock of merchandise embraced in the mortgage. The administrator represented the creditors as well as the estate. As such he had the right to disaffirm and treat as void the mortgage if it was made in fraud of the rights of creditors. It appears that there were other creditors of the deceased, and it is understood that he was insolvent. The administrator, therefore, had the right to take possession of the property, to sell it at public auction, and give a good title to the purchaser, provided the agreement complained of was, in fact, made.

As we have seen, the agreement may be a tacit understanding; it may be proved by parol or inferred from the fact that the sales were permitted by the mortgagee. The first bit of evidence we have upon the subject appears in the provisions of the mortgage in which, it was agreed that the mortgagor should remain and continue in the quiet and peaceable possession of the goods and chattels and have the full and free enjoyment of the same until default was made in the payment, which was a year from the date of the instrument. There was further evidence to the effect that the mortgagee was a brother of the mortgagor and that he had loaned the mortgagor the sum of \$340 to enable him to carry on the saloon. The stock in trade consisted of wines, ales, liquors and cigars. The business engaged in consisted of the sale of these commodities, and if they could not be sold the mortgagor could not well conduct his business of keeping a saloon. It further appears from the evidence that the mortgagor did continue the business of running the saloon down to about the time of his death, conducting it in the usual way. It appears to us that the jury had the right to infer from these facts that it was mutually understood between the parties that the mortgagor should have the right to sell and dispose of the merchandise embraced in the mortgage for and on his own account, and that the mortgage was consequently void as against creditors. This question was submitted to the jury without exception on the

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part of the defendant, and we must regard the parties as concluded by the finding.

Upon the trial evidence was given tending to show the plaintiff's receipts from sales made each day for two weeks before the property was taken. After the evidence had been taken the objection was made that there was no claim made for such damages. The objection was overruled and an exception was taken. Evidence was also given showing the expenses each day. The exception is not available here, for the reason that the objection was not made in time, and there was no motion to strike out the evidence taken. But such damages were claimed in the complaint. It was alleged that the taking of the property broke up, injured and destroyed the plaintiff's business; brought him into disgrace, and injured his business, reputation and credit, for which he suffered damages, etc.

In determining the amount of such damages it was necessary to understand the nature and amount of business that he was carrying on at the time the property was taken, and the receipts and disbursements for two weeks prior to that time does not appear to us to be too remote. (*Schile v. Brockhahus*, 80 N. Y. 614.) Evidence was also given tending to show that there was an arrangement between the administrator and the defendant by which the property was to be sold and the proceeds retained subject to the determination of the question of the validity of the mortgage. Objection was taken to this evidence as irrelevant and incompetent. The conversation was with Mr Tenny, the defendant's lawyer, the person who had been employed to foreclose the mortgage and take possession of the property. A controversy had arisen between him and the public administrator as to the validity of the mortgage; the objection was not placed upon the ground that Tenny was not authorized to make the arrangement; had it been, evidence to that effect might have been supplied; for this reason the exception is not well taken.

The plaintiff was permitted to testify as to the cost of articles purchased by him from other sources than the

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administrator, which he claimed was taken by the defendant, and also as to the amount that he paid for the property taken at the administrator's sale. The first objection was based upon the ground that it furnished no evidence of the actual value at the time that the property is alleged to have been taken. It, however, appeared that the property had been purchased within three weeks of the time that it was taken, and there is no pretense that it had changed in value during that time. The second objection was based upon the ground that the witness was not an expert as to the value of such property. The court admitted the evidence, but subsequently held that he was not qualified to give an opinion as to the value of the property, upon the ground that he was not an expert. His evidence was to the effect that he was familiar with such property; that he had bought and sold that grade of property, and had for eight years been engaged in the business of keeping a saloon and in buying and selling fixtures and saloons. It appears to us that he was competent to express his judgment as to the value of the property, and we are, therefore, of the opinion that the evidence was competent and within the rule stated in the case of *Hoffman v. Conner* (76 N. Y. 121-124).

The defendant requested the court to charge that the plaintiff must prove that this mortgagor actually sold, as his stock in trade, property covered by the mortgage and applied the money to other purposes than the mortgage debt, which was refused. It was the agreement that the mortgagor might sell the stock in trade and apply the proceeds to other purposes than the mortgage debt, that vitiated the mortgage, and not the fact that such sale had been made. But the request is incomplete, and as it stands is meaningless. It does not point out the consequences that would result in case of failure to make such proof. We suppose that the defendant intended to request the court to charge that the plaintiff, in order to recover, must prove, etc. The proposition was substantially charged, and we do not feel justified in supplying the words necessary to make the exception available. We have exam-

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ined the other exceptions appearing in the case, but are of the opinion that they point to no error.

The judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

JAMES MACNAUGHTON, on Behalf of Himself and Others,
Appellant, v. RALPH R. OSGOOD et al., Respondents.

The record on appeal in an equity action showed that the action was brought to trial at a circuit before a jury: that at the close of the evidence defendants' counsel moved to dismiss the complaint and plaintiff asked to go to the jury upon certain questions of fact. Plaintiff's motion was denied, the complaint dismissed and exceptions ordered to be heard in the first instance at General Term. At General Term an order was entered overruling the exceptions and denying plaintiff's motion for a new trial, and a judgment was then entered which recited the trial, the direction for the dismissal of the complaint, the exceptions thereto, the order that they be heard in the first instance at General Term, the motion for a new trial and the decision of the General Term thereon, and adjudged that the complaint be dismissed with costs and disbursements. Plaintiff appealed to this court, stating in his notice of appeal that he intended to bring up for review the order of the General Term denying the motion for a new trial. *Held*, that the record presented no question for review upon the merits; that, regarding the proceeding as a trial by the court, no decision was made as required by the Code of Civil Procedure; that there was no authority to direct exceptions in a case triable by the court to be heard in the first instance at the General Term, that proceeding being limited to a case triable by a jury. (§ 1000.)

A motion for a new trial, except in the cases specified in sections 999, 1000 and 1001 of said Code, must, in the first instance, be made at Special Term. In an equity action the complaint cannot be dismissed on a trial of questions of fact by the jury. A verdict must be rendered upon all the questions submitted and the case afterwards brought to a hearing before the court the same as if there had been no verdict.

(Argued June 10, 1889; decided June 18, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 20, 1886, which affirmed a judgment in favor of

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defendants, and ordered the exceptions to be heard in the first instance at the General Term.

The nature of the action and the facts are sufficiently stated in the opinion.

George L. Stedman for appellant.

Esek Cowen for respondents. This was an action in equity, and was properly decided by the court as to the facts as well as the law, and no error was or could be committed by the trial court in refusing the plaintiff leave to go to the jury upon the facts. (*Brinckerhoff v. Bostwick*, 99 N. Y. 185; *Carroll v. Deimel*, 95 id. 252.) The exception of the defendant to the ruling of the court, dismissing the complaint, was not well taken, and can present no question for the decision of this court, except, perhaps, the question whether or not the plaintiff had an absolute and undisputable right to the relief demanded in the complaint, or some part of it. (*Bishop v. Empire T. Co.*, 37 N. Y. Supr. Ct. 12.)

George Richards for trustees, respondents. The court was not in error in denying the plaintiff's motion, made for the first time at the trial, to go to the jury upon the questions of fact. (Code, §§ 970, 971; *O'Neill v. James*, 43 N. Y. 84; *Winchell v. Hicks*, 18 id. 558; *Muller v. McKesson*, 73 id. 198; 95 id. 252.) The framing of issues of fact in equity causes is a discretionary matter, and a refusal is not the subject of an appeal. (*Wright v. Nostrand*, 94 N. Y. 31.) In equity causes, if substantial justice has been done, a reversal or a new hearing will not be granted. (*Matter of N. Y. C. R. R. Co.*, 90 N. Y. 342.) As plaintiff preferred no request to the trial justice to make any findings of fact or conclusions of law, and if there were any omission or irregularity in that regard, it would not be chargeable to the respondents. (*Grant v. Morse*, 22 N. Y. 325; *Woodhull v. Rosenthal*, 61 id. 390, 391; 46 id. 259; 48 id. 365; 54 id. 217.) Though in form the prayer of a complaint may show an action purely equitable, the parties, notwithstanding, may try it at a circuit before a jury, and be

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bound by the rules of practice applicable to such a trial (*Smith v. Osborn*, 45 How. 351.) Though the case cannot legally be tried by a jury, if the parties proceed to trial before a jury, the cause will, as a matter of practice, be regarded as properly a jury case. (*Enos v. Dayharsh*, 5 N. Y. 531.) Parties may waive the right to a jury trial. (Code, § 1000.) An exception to a dismissal of the complaint, as well as the other exceptions, may be ordered to be so heard by the General Term. (*Lake v. Artisans' Bk.*, 3 Abb. [N. S.] 209; *S. C.*, 3 Keyes, 276.) Such an order has been held not to be appealable. (*Beattie v. Niagara Sav. Bk.*, 41 How. 138.)

Dickinson W. Richards for The Osgood Dredge Company, respondent.

BROWN, J. This action was brought by the plaintiff to obtain a judgment restraining the defendants, who are officers of the Osgood Dredge Company, from paying to themselves salaries, voted to themselves, and to compel them to refund to the corporation, amounts paid as salaries before the commencement of the action. After setting forth the facts which it is claimed give rise to the cause of action, the complaint demands judgment as follows: "Wherefore the plaintiff demands judgment that the defendant Osgood, Howe and Blessing, and each of them, be enjoined and restrained from paying to the said Howe \$100 per month as salary, to the said Osgood \$200 per month as salary, and that the said Howe and Osgood, respectively, repay to the said Osgood Dredge Company the moneys already received by them; * * * and that the acts of said trustees fixing the salaries of said Osgood and Howe be declared fraudulent and in violation of their duties, and for such other and further relief as may be just and proper." The defendants all answered. The record before the court shows that the action was brought to trial at the circuit in the city of Albany January 22, 1880. At the close of the testimony the defendants' counsel moved to dismiss the complaint, and the plaintiff asked to go to the jury upon certain questions of fact. The latter motion was denied and the complaint dismissed, to all of

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which plaintiff excepted. The court then ordered the exceptions to be heard in the first instance at the General Term, and stayed proceedings meanwhile. The case was heard at General Term and decided in May 1886, by which decision the exceptions were overruled and the plaintiff's motion for a new trial was denied, and an order entered accordingly. A judgment then appears to have been entered, which recites the trial, the direction for the dismissal of the complaint, and the exceptions thereto, the order that the exceptions be heard in the first instance at the General Term, the motion for a new trial upon such exceptions and the decision thereon of the General Term, and adjudges that the complaint be dismissed and that the defendants recover of the plaintiff the costs and disbursements. From the judgment so entered the plaintiff appealed to this court specifying in his notice of appeal his intention to bring up for review the order of the General Term denying the motion for a new trial.

The action was one triable by the court, and neither party was entitled to a trial by a jury. (Code of Civ. Pro. §§ 968, 969.) Questions of fact arising upon the issues might, however, have been directed by the court to be tried by a jury. (§ 971.) The determination of the jury upon such questions is not, however, controlling on the court upon the facts involved in the issue.

Prior to the Code the practice was to award a feigned issue and take the verdict of a jury thereon to aid the chancellor; and, though differing in form under the Code, the practice is substantially the same. (*Vermilyea v. Palmer*, 52 N. Y. 471.) For like purposes issues may be framed and sent to the circuit for trial by a jury, and the court, upon further hearing of the case, may adopt the findings of the jury upon the facts or may modify or reject them altogether. The action must be brought to a hearing before the court, and the court's decision must be made in writing in the same manner as if there had been no verdict of the jury on the issues. (*Acker v. Leland*, 109 N. Y. 5; *Carroll v. Deimel*, 95 id. 252.)

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For the purpose of a review upon the merits there must be a decision in writing, in which the facts found and the conclusion of law must be separately stated, and such decision must direct judgment to be entered thereupon. (Code, § 1022.) And appropriate exceptions must be taken to such conclusion of the court in the manner provided by statute. (§ 994.) In this case the record before us does not present any question for review upon the merits. No question of fact was directed to be tried by a jury and none was submitted to the jury that was impaneled at the circuit. If we regard that proceeding as a trial by the court, no decision has ever been made in the manner directed by the Code. There was no authority to direct exceptions in a case triable by the court to be heard in the first instance at the General Term. That proceeding is limited to a case triable by a jury. (§ 1000.)

A motion for a new trial, except in the cases specified in sections 999, 1000 and 1001 of the Code, must, in the first instance, be made at the Special Term. And in an equity action the complaint cannot be dismissed on a trial of questions of fact by the jury. A verdict must be rendered upon all the questions submitted and the case afterwards determined by the court. (*Moore v. Met. Nat. Bk.*, 55 N. Y. 41; *Birdsall v. Patterson*, 51 id. 43.) The proceedings contained in the record were, therefore, irregular and unauthorized. There has been no trial in the manner provided by law, and no decision appears in the case; and there is nothing to support the judgment appealed from, and no question upon the merits of the case is before this court.

The judgment should be reversed, without costs, with leave to the parties to proceed *de novo* at the Special Term in such manner as they shall be advised.

All concur, except PARKER, J., not sitting.

Judgment accordingly.

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*Argued June 18, 1889; decided June 25, 1889.***JAMES B. CORBETT, Respondent, v. THE TWENTY-THIRD STREET
RAILWAY COMPANY, Appellant.**

The rule of the common law, that an action to recover damages for a personal injury abates on the death of the plaintiff, is not changed by the Code of Civil Procedure except where "a verdict, report or decision" has been rendered upon the issues. (§ 764.)

A nonsuit on trial by jury is not a "decision" within the meaning of said Code, nor is an order of General Term reversing a judgment entered on the nonsuit; that word refers to a decision made by a court on trial without a jury.

A stipulation for judgment absolute, in case of affirmance, given by defendant on appeal to this court from the General Term order of reversal, does not prevent the abatement of the action, where plaintiff dies after the appeal.

(Argued June 18, 1889; decided June 25, 1889.)

MOTION to revive and continue.

The action was brought to recover damages for personal injuries.

On trial at circuit the court nonsuited plaintiff. From the judgment entered thereon plaintiff appealed to the General Term, which reversed the judgment and ordered a new trial. Defendant appealed from the order to this court giving the requisite stipulation for judgment absolute in case of affirmance. After the appeal was perfected the plaintiff died.

Hermon H. Shook for motion. The motion is properly made to this court. (Code of Civil Pro. § 1299.) There having been two decisions in this case before the death of the plaintiff, the action has not abated. (Code of Civil Pro. §§ 764, 3343, sub. 5; *Eaton v. Wells*, 82 N. Y. 576; *Coit v. Bland*, 12 Abb. 462; 22 How. 2.) Under the former Code of Procedure a verdict was necessary to prevent an abatement. (Code of Pro. § 121.) The courts limited it to cases where the verdict was upheld. (*Woods v. Phillips*, 11 Abb. [N. S.] 1; *Spooner v. Keeler*, 51 N. Y. 527.) If a verdict was set aside, before or after the death of a party, the representatives could pros-

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ecute any appeal or other remedy capable of restoring it. (*Woods v. Phillips*, 11 Abb. [N. S.] 1.) It seems to have been left an open question whether the action could be continued after a final order for a new trial. (Code of Civil Pro. § 764; Laws of 1881, chap. 277.) The present motion should be granted as the judgment here has not yet been finally set aside. (Code of Civil Pro. §§ 191, sub. 1, 194.) As there was a non-suit the facts and law were both before the General Term, and, consequently, when the appeal comes on to be heard here it will present a case for the application of the rule that where a new trial is ordered by the General Term, wher' the facts and law are both before it, if the defeated party, instead of going back for a new trial, appeals to the Court of Appeals with a stipulation, he incurs the danger of an affirmance even on technical grounds and a judgment absolute. (*Mackey v. Lewis*, 73 N. Y. 382; *Arnold v. Robertson*, 50 id. 683; *Jameson v. Ring Ass.*, 54 id. 673; *People v. Supervisors*, 70 id. 228; *Krekeler v. Thaule*, 73 id. 608; *Godfrey v. Moser*, 66 id. 250.) The stipulation of the appellant was a virtual waiver of all questions save the one question of the opinion of this court on the rights of the parties. (*Cox v. R. R. Co.*, 63 N. Y. 414.)

Leslie W. Russell opposed. The action has abated. (2 P. S. 447, §§ 1, 2; *Hegerich v. Keddie*, 99 N. Y. 258; *Cregan v. Crosstown R. R. Co.*, 75 id. 192; 83 id. 595; *Price v. Price*, 75 id. 244.) The determination of the General Term was not a "decision" within section 764 of the Code of Civil Procedure. (Code of Civil Pro. §§ 1010, 1022; *Adams v. Nellis*, 59 How. Pr. 385.) If the judgment at the circuit had been in favor of the plaintiff instead of the defendant, and it had been reversed and a new trial ordered, plaintiff's death before the second trial would have stopped the action. (*Stringham v. Stewart*, 22 Abb. N. C. 281.) The case would be different if the plaintiff had had a verdict at circuit and the General Term had reversed it. Then an appeal could have been prosecuted by plaintiff's representatives because they

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would have been seeking to restore the judgment, a property right, and would not have been proceeding to establish the original cause of action. (*Wood v. Phillips*, 11 Abb. [N. S.] 1.) The thing the executors seek to defend is not a judgment, but merely an order that the original cause of action shall be heard and the personal injuries assessed. (*Spooner v. Keller*, 51 N. Y. 537; *Comstock v. Dodge*, 43 How. Pr. 97; *Kelsey v. Jewett*, 34 Hun, 11; *Smith v. Lynch*, 12 N. Y. Civ. Pro. Rep. 348.)

FOLLETT, Ch. J. This action is for a recovery of damages for a personal injury (Code of Civ. Pro. § 1343, subd. 9), and the rule of the common law that such an action abates on the death of the plaintiff is not changed by section 764 of the Code of Civil Procedure, unless a verdict, report or decision has been rendered upon the issues. Neither a verdict nor a report has been rendered in this action. The word "decision," as used in this section, refers to a decision made by a court upon a trial of issues without a jury. (Code of Civ. Pro. § 1343, subd. 5.) This action was not tried by the court without a jury, and the nonsuit is not a decision within the meaning of section 764. The order of the General Term reversing the judgment entered on the nonsuit was not made upon the hearing or trial of the issues, and is not a decision within the meaning of the section last cited.

The stipulation given by the defendant upon appealing to this court does not prevent the abatement of the action. The law-making power did not intend that the stipulation provided for in subdivision 1 of section 191 should relate to or affect the survivability of causes of action, or the abatement of actions; nor did either of the parties to this action intend that the stipulation should affect or have any relation to the abatement of the action, or to the survivability of the cause of action. The action has abated and the court is without power to revive it.

The motion to revive should be denied, with costs.

All concur.

Motion denied.

Statement of case.

EUGENE E. FREDENBURG, Respondent, *v.* THE NORTHERN CENTRAL RAILWAY COMPANY, Appellant.

Plaintiff, a switchman employed in defendant's yard at E., while engaged in coupling cars stepped into a cattle-guard and was injured. In an action to recover damages, it appeared that the cattle-guard was near scales where defendant weighed its cars, and the cars, when pushed from the scales, passed over it; it had been there for several years, and no injury, so far as appeared, had resulted from it. Plaintiff had been in defendant's employ three days. The accident happened in the evening. Plaintiff had a lighted lantern and was directed to couple a car just pushed from the scales with one that had preceded it; the ends of the two cars which he sought to couple were over the cattle-guard; he stepped into it and the injury resulted. Plaintiff's duties had not previously called him to the place in question. *Held*, the fact that the location of the cattle-guard was at a place where cars, when weighed, were habitually coupled, imposed upon defendant the duty to use care to make that place reasonably safe for its employes; and the evidence authorized a finding that defendant, in permitting the cattle-guard to remain in that place in the condition it was, failed to perform its duty to its employes, and so was chargeable with negligence; also, that the evidence justified a finding that plaintiff had no knowledge of the cattle-guard, and was not guilty of negligence in failing to observe it.

(Argued June 11, 1889; decided June 25, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 1, 1886, which affirmed a judgment in favor of plaintiff, entered on a verdict.

The nature of the action and the material facts are stated in the opinion.

Diven & Redfield for appellant. Plaintiff was bound to make himself acquainted with the situation and the duties of the occupation he voluntarily assumed. (*De Forest v. Jewett*, 88 N. Y. 264.) The permanent, necessary and visible construction of switches, cattle-guards and things of that nature, necessarily affecting the safety of brakemen in the performance of their ordinary work, are things they must learn by the

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exercise of observation, and must not wait to be told of them by those who acquired knowledge in the same way. (*Robinson v. C. R. I. & P. R. R. Co.*, 71 Iowa, 102; 32 N. W. Rep. 193.)

H. Austin Clark for respondent. It was negligence in the defendant to suffer this excavation, hole or cattle-guard at this place where they required plaintiff to couple cars. (*Rummell v. Dilworth, Porter & Co.*, 3 East. Rep. 821; *Stringham v. Stewart*, 100 N. Y. 516; *Pantzar v. T. F. I. M. Co.*, 99 id. 368; *Benzing v. Steinway*, 5 N. E. Rep. 449.) The questions were of fact for the jury. (*Cook v. N. Y. C. R. R. Co.*, 1 Abb. Ct. App. Dec. 432; *Mehan v. S. B. & N. Y. R. R. Co.*, 73 N. Y. 585; *Plank v. N. Y. C. & H. R. R. R. Co.*, 60 id. 607; *Gibson v. Erie R. Co.*, 63 id. 449; *Laning v. N. Y. C. R. R. Co.*, 49 id. 521.)

BRADLEY, J. The action was founded upon the alleged negligence of the defendant, and brought to recover damages for personal injury suffered by the plaintiff while in the service of the defendant. The plaintiff had been in such service three days as switchman in the defendant's yard at Elmira, N. Y., and then while engaged in coupling cars his arm was crushed, and, as the consequence, was amputated. The evidence warranted the conclusion that the injury was caused by his stepping into a cattle-guard, where he was proceeding to couple cars. And the charge of negligence against the defendant is made upon the fact that it had put and maintained, as it had, the cattle-guard at that place. It was near the scales where the defendant weighed its cars, and on and over it the cars passed when pushed from the scales after being weighed. On this occasion the defendant was engaged in weighing cars. And when the weight of one was taken, that car was shoved off and at the same time another placed on the scales by the movement of the engine at the other end of the train. In that manner cars were displaced from and placed upon the scales until the weighing of those of the train put there for

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that purpose was completed. When the second one was shoved from the scales the plaintiff was directed to go and couple it with the car which preceded it. This he was proceeding to do when he received the injury. The ends, which he sought to couple, of the two cars were over the cattle-guard, which he stepped into and fell. And it must here be assumed that this was the cause of the injury. His arm was caught between the bumpers of those approaching cars and crushed. When the plaintiff entered into the defendant's employment he assumed the usual hazards of the service and such risks as were apparent to observation. (*Gibson v. Erie R. Co.*, 63 N. Y. 449.)

But the duty was with the defendant to use reasonable care in providing suitable means, appliances and structures with a view to the safety of its employes, and that they might not unnecessarily be exposed to danger of injury in the service. The use of cattle-guards are essentially proper for recognized purposes at some places on railroads. The question has relation to the location and situation of this one. It had been there for several years. And although it had been usual to couple over it cars as they came from the scales, no injury, so far as appears, had resulted from it. The fact that the location in question was the place where cars, when weighed, were commonly and habitually coupled, imposed upon the defendant the duty to use care to make that place reasonably safe for that service of its employes. The description given of this structure was such, as to enable the jury to say, that it was liable to put in danger of injury a person proceeding to couple cars there without the caution which knowledge of it would enable him to exercise. And upon the evidence the finding of the jury was warranted that the defendant, in permitting the cattle-guard to remain at that place in the condition which it was, had failed to perform its duty to its employes, and was chargeable with negligence. But that did not render the defendant liable to the plaintiff if the cattle-guard was obvious or known to him at the time in question. (*De Forrest v. Jewett*, 88 N. Y. 264; *Appel v. B., N. Y. & P. R. R.*

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Co., 111 id. 550.) The occurrence was in the evening; it was then dark; and although the plaintiff had a lighted lantern, the evidence permitted the jury to find that he had no knowledge up to that time of the cattle-guard, and that without any negligence on his part he did not observe it at the time he attempted to couple the cars upon the occasion when he received the injury. It is urged that the plaintiff was bound to make himself acquainted with the situation presented by the various structures about the yard and their condition. It is quite true that his duty was to use due diligence to familiarize himself by observation with the structures and their situation and condition in the yard with a view to his own safety in the performance of his duty and for the protection of himself against injury. But his recent entrance into the service, and the fact that his duties hitherto had not called him to the place in question, enabled the jury to find that his failure to escape the injury, was not attributable to any want of diligence on his part in that respect. The case seems to be within the doctrine of *Plank v. New York Central and Hudson River Railroad Company* (60 N. Y. 607). The exception to the denial of the motion for nonsuit was, therefore, not well taken. And the questions of fact presented by the evidence were properly submitted to the jury.

The judgment should be affirmed.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

Statement of case.

EDWARD KANE, Appellant, *v.* THE CITY OF BROOKLYN,
Respondent.

The provision of the charter of the city of Brooklyn (§ 9, tit. 10, chap. 863, Laws of 1873) which declares that the assessment-roll "shall be duly sworn to by at least two of the assessors * * * to the effect that they have together personally examined within the year past each and every lot or parcel of land," etc., does not require that all of the verifying assessors should depose that they together examined the property; it is sufficient if at least two of them swear that they did so examine.

Where, therefore, a roll was verified by all of the assessors, each severally depositing that at least two of them "have together personally examined," etc., *held*, this was a sufficient compliance with the statute; that it was not necessary to identify the two who made the examination.

The provision of the act of 1878, relative to the collection of taxes and assessments in the city of Brooklyn (Chap. 846, Laws of 1878), which requires that "the annual taxes shall be confirmed by the common council, the tax-roll signed by the board of supervisors, and the books delivered to the collector of taxes on or before the fifteenth day of November," was not designed to change the method of assessing the annual taxes, but to fix the time within which all the requisite steps shall be taken, and the reference to the signing of the roll by the board of supervisors is simply to the signing of the warrant annexed to the roll as prescribed by the Revised Statutes. (1 R. S. 396, § 87.)

Where, therefore, it appeared that a roll was signed by a majority of the then board of supervisors, and was duly approved and confirmed by resolution of the board, *held*, that this met the requirements of the statutes. It is not essential to the validity of a return, made by the registrar of arrears, of taxes levied in the previous year remaining unpaid, that it shall be authenticated by a written certificate signed by the collector. A mistake in the printed list, prepared by the registrar, in the name of the street on which the property to be sold is situated does not affect the validity of the sale; it is sufficient if the ward, block and lot numbers be stated. (Chap. 405, Laws of 1885.)

The notice of sale, in pursuance of which plaintiff's property was sold, was dated and first published on March fifteenth; the day of sale specified was April fourteenth. *Held*, that this was a compliance with the statutory provision (§ 1, chap. 405, Laws of 1885) requiring the sale to be at a time "not less than thirty days after the first publication."

(Argued June 11, 1889; decided June 25, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

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made at the May Term, 1888, which affirmed a judgment in favor of the defendant, entered upon the decision of the court on trial at Special Term.

This action was brought to remove a cloud upon the title of real property belonging to the plaintiff in the city of Brooklyn, which had been sold for unpaid taxes for the year 1884, upon the ground that the assessment of taxes thereon was void; to cancel the sale and the certificate and record thereof, and to restrain the city and its registrar from executing or delivering a deed to the purchaser.

The material facts are stated in the opinion.

William J. Gaynor for appellant. The assessment-roll was never sworn to as required by law. (Laws 1873, chap. 863, tit. 10, § 9.) The oath taken is not the oath prescribed by the statute, but a voluntary oath on which perjury could not be predicated. (*Shattuck v. Bascom*, 105 N. Y. 45.) If the oath in question were not merely voluntary, and one to which no penal responsibility would attach, yet it does not come up to the test of specific asseveration of official responsibility and duty done which the statute prescribes. (*Merritt v. Portchester*, 71 N. Y. 309-312; *People v. Hagadorn*, 104 id. 516; *Brevort v. Brooklyn*, 89 id. 128-132; *Shattuck v. Bascom*, 105 id. 39; *Ellwood v. Northrup*, 106 id. 172-185; *Westfall v. Preston*, 49 id. 439-455.) A failure of two or more of the assessors to make the specific oath required by the Brooklyn charter that they viewed the premises, leaves the supervisors without jurisdiction to levy the tax. (*Brevoort v. Brooklyn*, 89 N. Y. 128-132.) When the law requires the tax-roll or list to be accredited by the signatures to it of certain officials it can have no validity unless so accredited. The registrar had no authority to sell the plaintiff's land, he having no written return or certificate from the collector that the tax on it remained unpaid. (Laws of 1871, chap. 574, § 5; *Hilton v. Bender*, 69 N. Y. 75; Cooley on Taxation [2d ed.] 475; *In re Cameron*, 50 N. Y. 502.) The notice of sale of the plaintiff's lot was insufficient. (*Bank v. Ives*, 2 Hill, 355; *Butts v.*

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Edwards, 2 Denio, 164.) The return to the registrar of arrears could not be made until after "the expiration of one year" from the date of the warrant. (*Bank v. Ives*, 2 Hill, 355; *Butts v. Edwards*, 2 Denio, 164; *Ex parte Dean*, 2 Cow. 605; *Cornell v. Mou'ton*, 3 Denio, 12; *Homan v. Linwell*, 6 Cow. 659; *Fairbanks v. Wood*, 17 Wend. 329; *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Small v. Edrick*, 5 Wend. 137; *Columbia Road Co. v. Haywood*, 16 id. 422; *Young v. Whitcomb*, 46 Barb. 615; *People v. N. Y. C. R. R. Co.*, 28 id. 284; 2 R. S. [7th ed.] 1884.)

Almet F. Jenks for respondent. There must be substantial compliance with all requirements of the statute which are intended for the benefit or protection of the taxpayer. Absolute and literal compliance is not required. (*Westfall v. Preston*, 49 N. Y. 349; *Brevoort v. Brooklyn*, 89 id. 128; *B. & S. L. R. R. Co. v. Erie*, 48 id. 93.) The oath of the assessors was in compliance with the law. (Laws of 1873, chap. 873, tit. 10, § 9.) On this oath, as it stands, an indictment for perjury could be found if there had been any neglect of statutory duty. (Penal Code, §§ 96, 97, 98, 101; *Van Steenburgh v. Kortz*, 10 Johns. 167.) The notice was ample within the spirit of the law. (*In re U. E. R. R. Co.*, 112 N. Y. 62, 75.) The supervisors signed the tax-rolls within the contemplation of the law. (*Chamberlain v. Taylor*, 43 Hun, 24, 31; *Sorchan v. City of Brooklyn*, 62 N. Y. 339; *Loo v. Weld*, 52 Me. 588; *Bailey v. Ackerman*, 54 N. H. 527.) The sale day was legal. The time is to be not less than thirty days after March fifteenth, the first day of publication. (Sedgwick on Stat. Law, 356; Laws of 1885, chap. 405, § 1; *Dutcher v. Wright*, 94 U. S. 553-560; *Sheets v. Seldon*, 2 Wall. 177, 190.) The notice for correction was sufficient. (Laws of 1873, chap. 873, tit. 10, § 8; Cooley on Tax. 364; *In re De Peyster*, 80 N. Y. 565, 572; *In re McMahon*, 102 id. 176, 184.)

VANN, J. The city of Brooklyn, according to its charter, has nine assessors, who are required each year to prepare an assessment-roll for every ward. Upon the completion of the

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roll the statute provides that it "shall be duly sworn to by at least two of the assessors, according to the oath provided by law in regard to assessment-rolls in the different towns of this state, and, further, to the effect that they have together personally examined, within the year passed, each and every lot or parcel of land, house, building or other accessible property." (Laws 1873, chap. 863, tit. 10, § 9, p. 1330.)

During the year 1884 the roll for the twenty-second ward contained an assessment upon lot five of block ninety-five, belonging to the plaintiff, for the sum of \$404.27, upon a valuation of \$15,000. He failed to pay this tax during the period required by law, and said premises were afterwards sold under the provisions of the charter relating to the collection of unpaid taxes, to the defendant, James Bryar, for the sum of \$8,000. A certificate of sale in due form was delivered to the purchaser and duly recorded, and thereby, according to a special provision of law, became an apparent lien upon said premises. (Laws 1873, chap. 863, p. 1332.) Plaintiff claims that said sale and certificate are void, and his first point in support of this position is that the assessment-roll was not sworn to as required by the provisions of the charter. The affidavit annexed to the roll was signed by each of the nine assessors, who severally deposed and swore as follows: "That we have set down in the foregoing assessment-roll all the real estate situated in the twenty-second ward according to our best information, and that with the exception of those cases in which the value of the said real estate has been changed, by reason of proof produced before us, we have estimated the value of the said real estate at the sums which the majority of the assessors have decided to be the full and true value thereof." Then followed that portion which is not the subject of contention, and at the close was the part which is the chief source of controversy, in these words: "And, further, that at least two of the assessors have together personally examined within the year past each and every lot or parcel of land, house, building or other accessible property." (Laws 1873, chap. 863, tit. 10, § 9.) While it is not claimed that

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the examination was not made as required, it is insisted that the formal proof thereof annexed to the tax-roll does not comply with the law. It is conceded that the affidavit conforms to the general requirement that it shall be in the form provided by law in regard to assessment-rolls in the different towns of the state, but it is claimed that it fails to meet the additional requirement already quoted from the city charter. Whether the affidavit upon its face appears to be probable or improbable, every part thereof must, in this action, be assumed to be true. The special provision of the statute, when analyzed, simply requires that the affidavit shall state that at least two of the assessors together made the requisite examination, and that they shall swear to it. The affidavit under consideration clearly states that at least two of the assessors together personally made such examination, so that the body thereof is in exact conformity to the statute. It contains all that the law specifically requires, substantially, if not literally, in the language of the section in question. But did the examining assessors swear to it? How can it be claimed that they did not, since all of the assessors swore to it? Nine, the entire number, swear that at least two of the nine made the examination. As all swear, the two or more who personally examined necessarily swear to the fact that they did so examine. When nine men state that two of their number did a certain act, the two who did the act state that they did it. While seven speak of the two, the two speak of themselves. It is true that the affidavit does not specify which two made the examination, and the law does not require that it should. It is provided that not less than two shall do the act specified and swear to it. Two did the act and nine, including the two, swore to it. It necessarily follows that the two who so acted swore to the fact. It is not a valid objection to the affidavit that more swore to it than were necessary, for the statute plainly authorizes more than two, and hence all to swear to it. It does not require that all of the verifying assessors should depose that they together, personally, examined the property, but that at least two should swear that they thus examined, and,

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as already appears, the oath was taken by those assessors who, whether two or more, made the personal examination. On the record, as presented, it cannot be assumed that all of the assessors acting together as a board or body did not make the examination. Their affidavit, when literally read, indicates that they did, and so the learned General Term held. Even if it does not admit of this construction, the criticism that it fails to identify the two assessors who viewed the property, and hence that it operates as a protection against a prosecution for perjury, has no force, because the Penal Code in defining that offense, declares that an unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false. (§§ 96, 100.)

It is obvious that any assessor who united in the affidavit without personal knowledge that, at least, two of the board made the examination as stated, assumed a grave responsibility. We think that the affidavit is a substantial compliance with the statute, and that even if it does not identify the assessors who actually examined the property, it cannot be held up as a shield for official misconduct.

The plaintiff further claims that the tax upon his property was invalid because the "tax-rolls" were not signed by the board of supervisors. The basis of this objection is not found in the city charter nor in any general law relating to the subject of taxation, but in "An act relative to the *collection* of taxes and assessments in the city of Brooklyn." (Laws 1878, chap. 346.) This act is not a part of the general system for the assessment of taxes in that city, but, as its title indicates, was designed to aid in the collection of taxes after they had been duly assessed. It is regulative rather than creative in character. The first section relates to certain administrative details in the collection of taxes for local improvements. The second provides for the cancellation of assessments for such improvements under certain circumstances. The third section, after prescribing the rate of interest to be added to taxes, closes with this sentence: "The annual taxes shall be confirmed by the common council, the tax-roll signed by the board of supervisors and the books

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delivered to the collector of taxes, on or before the fifteenth day of November in each year, and the collection of taxes shall be commenced on the first day of December in each year." The remaining sections permit allowances to be made upon taxes paid within a prescribed period, regulate the interest to be paid upon redemption from tax sales, and authorize the comptroller to transfer unused appropriations to the revenue fund. A comparison of this statute with the city charter, and with that part of the Revised Statutes relating to the assessment of taxes, makes it apparent that the part quoted was not designed to change the method of assessing the annual taxes, but simply to fix the time within which all the steps required by the general tax laws to finish the assessment should be completed. It is a directory recital of those steps required by existing laws, preliminary to making a change of time, when the collection of taxes should commence; and in referring to "the tax-roll signed by the board of supervisors," refers to an act already provided by law. That act is the signing of the warrant annexed to the tax-rolls, as prescribed by the Revised Statutes. (2 R. S. [7th ed.] 996, § 37.) The Special Term found that the warrants were annexed to the rolls unsigned, and that thereafter they "were signed and sealed by a majority of the then board of supervisors of the county of Kings," and, by resolution, were duly approved and confirmed. The warrant in question refers to "the foregoing assessment-roll of the twenty-second ward of the city of Brooklyn." We think that this was all that was contemplated or required by the statute when construed in connection with other legislation upon the same subject.

The third objection urged against the validity of procedure on the part of the city is that the collector did not make a written return to the registrar of arrears of all unpaid taxes levied during the previous year. It was found as a fact by the trial court that, on the fifteenth of November, 1885, the collector made a return to the registrar "of all items of taxes levied in the previous year remaining unpaid," and that such return "was made on sheets corresponding

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in size and ruling." It is not claimed that this return was incorrect in any respect, or that it did not contain all that the statute requires, but it is contended that it was invalid for the want of a written certificate signed by the collector. The statute directs the collector "to make a return to the registrar;" that such return shall be made on sheets corresponding in size and ruling, and that it shall be the duty of the registrar to cause such sheets to be bound in volumes. It contains no other provision upon the subject. It does not require that any certificate shall be made, or that the return shall be authenticated in any manner. It simply commands that a return be made in a certain way of the unpaid taxes for the previous year. The return for the year 1884 was so made, consisting of fifteen books, officially prepared in the form required by law and delivered to the registrar, who receipted to the collector for the same "as containing the amounts of unpaid taxes and assessments in the 'tax-rolls' for the year 1884." We think that this was a compliance with the statute, and that if the legislature had intended that there should be a certificate, it would have required it by express terms. We cannot add a requirement which the law-making power has not seen fit to exact. It is a sufficient answer to the objection under consideration to say that it is not so written in the law.

The statute expressly provides that a mistake in the printed list of the property to be sold, prepared by the registrar for distribution among such as apply, as to the name of the person to whom the parcel of land is assessed, the assessed valuation thereof, or any other matter or thing thereinbefore required or authorized to be stated in the tax-list, shall not in anywise be an objection to the validity of a sale, provided the ward, block and lot numbers of the land are correctly stated in the said list. (Laws of 1885, chap. 405.) As the printed list in question correctly stated not only all of the particulars required, but others in addition, the partial error in the name of the street is no objection to the validity of the sale. When all of the prescribed descriptive facts are accurately given, the statute is satisfied. The name of the street upon which the property was

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situated is not one of those facts. The statutory description does not include it, but is complete without it. Not only were the ward, block and lot numbers correctly stated, but also the name of the owner, and the location of the property upon one street. No one reading the entire description could have been misled, and there is no proof that the plaintiff, who is presumed to have known that his property was assessed, was not fully apprised of the facts, or that he did or omitted to do anything in reliance upon the slight misdescription. The description, as a whole, identified and described his property only. The object of said provision relating to mistakes was to protect the property owner by requiring certain unmistakable facts to be stated in the description and to protect the public from evil results on account of unimportant errors.

While all of the objections urged in behalf of the plaintiff have been carefully considered, it is deemed best to here notice but one other. The requirements of the statute in regard to the day of sale are, in substance, that the registrar shall publish a notice at least once in each week for four weeks in each of the corporation newspapers that the several parcels of land "will be sold at public auction to the highest bidder at a time and place specified in said notice, not less than thirty days after the first publication thereof." (Laws 1885, chap. 405, § 1.) The notice pursuant to which the plaintiff's property was sold is dated and was first published on the fifteenth of March, while the day of sale specified therein is April fourteenth. It is claimed that this notice was not sufficient because "the sale was, in fact, fixed to be on the thirtieth day after the first publication." The general rule for the computation of time in this state is to exclude the first day and to include the last. By excluding March fifteenth, the first day of publication, there still remain sixteen days in that month, which, when added to the first fourteen days of April, complete the statutory period. If the sale had taken place at a time less than thirty days after the first publication, it necessarily would have been held prior to April fourteenth. Not less than one day after would be March sixteenth; not less

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than sixteen, March thirty-first; not less than seventeen, April first; not less than thirty, April fourteenth, which was the day of sale. The statute does not provide for a sale after the expiration of thirty days, but on a day not less than thirty days after a given day. Hence the authorities based upon statutes requiring an act to be done after the expiration of a specified period have no application.

As said in *Dutcher v. Wright* (94 U. S. 553, 560), search has been made in vain for a decided case in which it is held that both the day of the act and the day of the event shall be included in the computation, in order to ascertain the specified period of time.

We have not considered the effect of the curative act, passed in 1888 (chap. 583, tit. 10, § 9), as we think that the several statutes governing the assessment and sale in question have been substantially complied with.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

**ELLEN T. HAYES, Respondent, v. CHARLES J. NOURSE, Jr.,
Appellant.**

A pending action, brought to establish title to or a lien upon land, does not of itself, nor does a duly recorded notice of its pendency, make the title defective or create a lien on the land.

The fact that all the heirs of a deceased plaintiff, in an action to compel a specific performance by the vendor of a contract for the sale of land, are infants is not a legal excuse for a failure on their part to perform the contract of their ancestor, and the *laches* which would have barred the action had he survived, will bar its prosecution by them.

A purchaser *pendente lite* of the subject of the litigation in such an action, if he buys in good faith, and without actual notice of the claims of the litigants, is not affected by the suit pending, unless it has been prosecuted with due diligence.

The right of the plaintiff in such an action to revive and continue it against the successors in interest of a deceased defendant may be lost by long delay in making the application, especially if the successors are purchasers in good faith, and if the condition and value of the property

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have greatly changed, and the only witnesses by whom the facts in issue could have been established are dead.

In an action by the vendee to recover back a payment made upon an executory contract for the sale of land, on the ground that the title was defective, it appeared that, in 1819, K. owned the premises in fee, and was in possession; he died in 1824 seized of the premises, which, by his will, he devised to his five children. Four of them deeded their interests to the fifth; the deed was recorded, and the grantee took and remained in possession until 1854, when she conveyed the premises to P., who took and remained in possession until 1884, when he conveyed them to defendant. The contract for the sale was made in March, 1885. The facts upon which the objection to the title was based were these: In July, 1836, a bill in chancery was filed by the heirs of one McG. against the devisees of K., and on the same day a notice of the pendency of the action was also filed. The bill alleged these facts: In 1819 an executory contract for the sale of the premises by K. to McG. for \$1,200 was executed by them; \$200 was paid thereon by the vendee, who entered into possession, and, in 1820, expended \$2,000 in making improvements upon the premises. To complete the improvements McG. borrowed \$300 of K. upon an oral agreement that K. would convey the lots to McG. and receive from him a mortgage as security for the loan and the balance of the purchase-price; and to secure K. until the deed and mortgage were discharged, McG. delivered the contract to K., who never returned it and failed to convey. McG. continued in possession, paying interest on the contract until May, 1825, when he died intestate, leaving the complainants, then infants of tender years, his only heirs-at-law. Shortly thereafter defendants took and have since retained possession. The answer set up various perfect defenses. The proofs were declared closed in April, 1888. No proceedings were thereafter taken in the suit, except in May, 1844, when there was a substitution of solicitors for complainant. All of the defendants in said suit died prior to November 6, 1881, about twenty years before the trial of this action. P., then the owner, and then for the first time being advised that there was a question as to the title, made strenuous but ineffectual efforts to find the complainants in the chancery suit. It did not appear what had become of them; simply that they had not been heard of for many years, and were supposed to be dead. Held, that P., having purchased without actual notice of the chancery suit or the alleged claim of the complainants, acquired a perfect title, unless bound by the bill and the *lis pendens* therein; that defendant succeeded to all his rights, and a purchaser from him, although purchasing with knowledge of said claim, would acquire a perfect title; that, assuming all the allegations of the bill were true at its date, and that they were sufficient to have entitled the complainants, at the time the bill was filed, to a judgment requiring the then owner to receive the remainder of the purchase-price, and to convey the premises, yet, that the said complainants, if living, and, if dead, their

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successors in interest, were effectually barred at the time of the execution of the contract in question from reviving and continuing said suit; and that there was no defect in defendant's title justifying plaintiff in refusing to perform.

(Argued March 5, 1889; decided June 28, 1889.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city of New York, entered upon an order made June 6, 1887, which affirmed a judgment in favor of plaintiff, entered on the report of a referee.

This action was brought to recover a payment made at the time of the execution of a contract for the sale of lands on the ground of defect in title.

In 1819 Peter Kemble owned in fee and was in possession of two lots now known as No. 56 Marion street and No. 91 Crosby street, in the city of New York. February 1, 1823, he died, having devised these lots to his five children, share and share alike. His will was duly probated. April 7, 1824, four of the devisees conveyed these lots to the fifth devisee, Mary Kemble, who recorded her deed, and subsequently (the date not appearing), took possession under her deed, remained in possession until October 5, 1854, when she conveyed the lots to James N. Paulding, who recorded his deed, immediately took possession under it, and remained in possession until August 30, 1884, when he conveyed the lots to the defendant in this action in trust, for the benefit of creditors. March 25, 1885, the defendant sold the lots by public auction to the plaintiff for \$26,100. She paid down ten per cent, \$2,610, and \$40 auctioneer's fees, total \$2,650, and contracted to pay the remainder of the price and take a deed April 15, 1885. But before that date she discovered facts which, she asserts, makes the defendant's title defective, or, at least, so doubtful that she is entitled to rescind the sale and recover the amount paid. By mutual agreement the time for the performance of the contract was extended to May sixteenth, when the plaintiff finally refused to take the title, demanded the repayment of the \$2,650, and on the same day began this action.

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The facts discovered were : (1) A bill filed July 31, 1836, in the late Court of Chancery, wherein John McGeer, Thomas McGeer, Peter McGeer, an infant, and Mary A. McGeer, an infant, were complainants, and Gouverneur Kemble, William Kemble, Richard F. Kemble, Mary F. Kemble and Gertrude Kemble Paulding (the wife of James K. Paulding), the five children and devisees of said Peter Kemble, were defendants ; (2) a notice of the pendency of the action, filed the same day, pursuant to 2 Revised Statutes, 174, section 43 ; (3) the joint and several answer of the defendants, verified January 28, 1837 ; (4) depositions taken in the suit in November and December, 1837, before a master ; (5) an order entered April 26, 1838, closing the proofs ; (6) an order entered May 25, 1844, substituting Charles O'Connor as solicitor for the complainants.

It is alleged in the bill that, August 13, 1819, Peter Kemble and Arthur McGeer (the father of the complainants) mutually executed an executory contract, by which Kemble agreed to sell, and McGeer to purchase, the lots for \$1,200, and that September 18, 1819, the vendee paid \$100, and November 20, 1819, \$100, on the contract, entered into possession, and in 1819 and 1820 expended \$2,000 in erecting a dwelling and making other improvements. That to complete the dwelling McGeer borrowed \$300 of Kemble upon an oral agreement that Kemble should convey the lots to McGeer and receive from him a mortgage on them as security for the loan and the remainder of the purchase-price ; and that, to secure Kemble until the deed and mortgage should be exchanged, McGeer delivered the contract for the lots to Kemble, who failed to convey them and never returned the contract. It is further alleged that McGeer continued in possession, paying interest on the contract until May 25, 1825, when he died intestate, leaving the complainants his heirs, and only heirs-at-law, then infants of tender years ; and that shortly thereafter the defendants took, and have ever since retained, possession of the lots.

The defendants in the suit in chancery admitted in their answer the execution and delivery of a written contract of sale

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and the payment of \$200 thereon, but averred that the contract was to be performed within two years. They admitted that McGeer took possession, built a house and made improvements, but averred that the improvements did not cost \$2,000. It was admitted in the answer that Kemble loaned McGeer money to complete his dwelling, but it was denied that Kemble received the contract as security until a deed and mortgage could be exchanged between the parties; and it was averred that November 7, 1821, McGeer and Kemble had a settlement, and there was found due on the contract for money loaned and interest, \$1,700, which McGeer, by his bond, covenanted to pay in one year, with interest, but never paid this sum or any part of it. In short, several perfect defenses to the suit are alleged in the answer.

The referee in the case at bar found that no proceedings were taken in this equity suit between April 26, 1838 (when the proofs were declared closed), and May 25, 1844 (when Charles O'Connor was substituted as solicitor for the complainants), and that none have been taken since May 25, 1844. He found that all of the defendants in the equity suit, except Richard F. Kemble and Mary Kemble Parrott, died prior to November 6, 1881. He also found that about twenty years ago James N. Paulding, then the owner of the lots, made an unsuccessful effort to find the complainants, and that it does not appear what has become of them.

The plaintiff called as a witness James N. Paulding, who testified that about twenty years before the trial of this action he sold the lots by auction; but the purchaser found the papers in the chancery suit on file, and refused to take the title. Upon cross-examination he testified: "That attempt was twenty years before this sale, more or less; I should think quite that; I have not the data to give the exact date, but I should think it must be twenty years ago. When he, the purchaser at the auction sale, came to search the title, he made this objection; I did not push it; I was astonished; *that is the first thing I knew about anything being the matter with the title*; I let it go; I, at the time, tried to find these people,

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the McGeers; I employed the two men that I thought would be most likely to find out about these people; one was an agent I had then for the property; he had been agent for a long while, and knew all about it; the other was a merchant who had lived there for some time, and had known these parties; they did their best to find out about them, and reported to me that they could not be found or heard of; had not been heard of for a great many years; the last that had been heard of them was that the man had been a sort of river pirate, and the woman was a drunkard, and had been carried off to the poor house or asylum, or something or other, and had disappeared, and everybody came to the conclusion that they were dead; that was the general opinion."

Further facts appear in the opinion.

George Woodward Wickersham for appellant. The defendant was bound to give a good title to the property, *i. e.*, a title free from reasonable doubt. (*Fleming v. Burnham*, 100 N. Y. 3.) To entitle the plaintiff to the relief sought she was obliged to show that the defendant's title was not such; being the moving party suing to recover back the money she held the affirmative. (*Moser v. Cochrane*, 107 N. Y. 38.) A mere possibility that the title will prove defective is not sufficient to sustain the refusal of the purchaser to refuse it. (*Spring v. Sanford*, 7 Paige, 550; *Walton v. Meeks*, 41 Hun, 311; *Schermerhorn v. Niblo*, 2 Bosw. 161; *Moser v. Cochrane*, 107 N. Y. 38.) Nor does a mere claim by action establish a defect in title. It must appear that there is reasonable ground for the action and a reasonable possibility that it may be prosecuted. (*Mechanics' Bk. v. Culver*, 30 N. Y. 313; *Wilsey v. Dennis*, 44 Barb. 354; 1 Sugden on Vendors, 589.) Being brought to compel a specific performance of the contract, all the heirs-at-law of Peter Kemble were necessary parties, and the court would not proceed with the suit until they, or their heirs or representatives, in case of their death, were brought in. (1 Hoffman's Ch. Pr. 373, note 1; 1 Daniels' Ch. Pl. and Pr. 286, note 1; Sugden on Vendors [8th Am. ed.] 291, 305;

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Vest v. Sandford, 1 Salk. 154; *McCoitter v. Laurence*, 4 Hun, 107.) Any objection which might have been made in opposition to a bill of revivor before the statute could be shown in opposition to a motion to revive under the statute. (*Ins. Co. v. Slee*, 2 Paige Ch. 368; 1 Hoffman's Ch. Pr. 367; 2 Daniel's Ch. Pl. and Pr. 1508; Laws of 1849, chap. 239, § 2; *Beach v. Reynolds*, 53 N. Y. 1; *Coit v. Campbell*, 82 id. 509.) The right to revive a suit, as in favor of or against the heirs or representatives of a deceased party, depends upon the law as it existed at the time of his decease. (*Phillips v. Drake*, 1 Code Rep. 63; *Vrooman v. Jones*, 5 How. Pr. 369; *Spier v. Robinson*, 9 id. 325; Laws of 1849, chap. 439, § 2.) Courts of equity abhor stale claims, and in analogy to the statutes of limitations at law, always refused to review suits where a party had died before decree and where the application was made after such lapse of time as would have barred the original suit. (1 Story's Eq. Juris. § 1520; 1 Hoffman's Ch. Pr. 367; *Ins. Co. v. Slee*, 2 Paige, 368; *Lyon v. Park*, 55 Super. Ct. 539; *Beach v. Reynolds*, 53 N. Y. 1; *Coit v. Campbell*, 82 id. 509; *Lyon v. Park*, 39 Alb. L. J. 54; 18 N. E. Rep. 863.) A suit for the specific performance of a contract was, under the Revised Statutes, barred unless commenced within ten years after the cause of action accrued. (2 R. S. 302, § 52; *Bruce v. Tilson*, 25 N. Y. 194.) The right to revive and continue the chancery suit against the representatives of three of the defendants was, therefore, barred before the time fixed for closing the sale of this property. (Code, §§ 756, 760; *Coit v. Campbell*, 82 N. Y. 757; *Lyon v. Park*, 55 Super. Ct. R. 539; 18 N. E. R. 863.) The suit being for the specific performance, the unreasonable delay on the part of the plaintiff defeats his right. (Story's Eq. Juris. [12th ed.] 742, 750, 769, 771, 793.) The cause of action in a suit for specific performance, on the death of one of the plaintiffs, vests in the heirs-at-law of the deceased plaintiff and not in the survivors. (1 Story's Eq. Juris. § 790; 1 Sugden on Vendors, 201, 203, 205.) The failure of the parties to prosecute the chancery suit, and their abandonment of it for upwards of forty years,

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so impaired the force of the *lis pendens*, that, even assuming that the suit could be revived and continued and a decree rendered in favor of the complainants, neither James N. Paulding nor a purchaser taking title through him prior to such revivor, could be affected thereby. (*Murray v. Ballou*, 1 Johns. Ch. 556; *Parks v. Jackson*, 11 Wend. 453; 2 Pomeroy's Eq. Juris. §§ 633, 640; *Watson v. Wilson*, 2 Dana, 406; *Clarkson v. Morgan*, 6 B. Monroe, 441-448; *Petree v. Bell*, 2 Bush. 58; *Mann v. Roberts*, 11 Lea [Tenn.] 57; *Bybee v. Summers*, 4 Oregon, 354; *Herrington v. McCollum*, 73 Ill. 483; *Myrick v. Selden*, 36 Barb. 15; Bennett on *Lis Pendens*, § 118; *Trimble v. Boothby*, 14 Ohio, 109-113; *Fox v. Reeder*, 28 Ohio St. 181; *Gossom v. Donaldson*, 18 B. Monroe, 237; 1 Story's Eq. §§ 409-411; *Kennedy v. Porter*, 109 N. Y. 526.) The referee erred in admitting evidence concerning plaintiff's efforts to procure a loan upon the property and of his failure to do so because of the existence of the chancery suit, and also evidence of the examination of the title and refusal to make a loan on it by another attorney. (*Moser v. Cochrane*, 107 N. Y. 38; 1 Sugden on Vendors, 537; 1 Greenl. on Ev. § 133.) The referee erred in holding that the existence of the chancery suit and *lis pendens*, and the fact that the title had been once rejected, were material circumstances affecting the title and value of said property, the suppression or non-disclosure of which by the defendant at the time of the sale entitled the plaintiff to refuse to complete the purchase and to recover back what she had paid. (Rawle on Covenants, 570; 2 Eq. Juris. § 901; Dart's Vendor and Purchaser [5th ed.] 97; 1 Sugden on Vendors, 200.) The order of the Supreme Court, made June 17, 1885, canceling the *lis pendens* and dismissing the suit, disposed of it as a possible cloud upon the title to the premises, and the subsequent tender to the plaintiff, in view of the offer made before the time fixed to close the title, was good and timely; the plaintiff was bound to accept, and the referee erred in refusing to so hold. (*Hartley v. James*, 50 N. Y. 38; *Jenkins v. Fahey*, 73 N. Y. 355; *Schiffer v. Dietz*, 83 id. 300; *Rice v.*

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Barrett, 99 id. 403-405; *Mills v. Bliss*, 55 id. 139; *Niebuhr v. Schrieyer*, 10 Civ. Pro. 172; *Crawford v. Whitehead*, 1 Code Rep. [N. S.] 345; *Jewett v. Pickersgill*, 14 N. Y. Week. Dig. 200; *James v. Shea*, 28 Hun, 74; *Gross v. Clark*, 87 N. Y. 272; *Bolton v. Jacks*, 6 Robt. 166-216.)

W. B. Putney for respondent. The defendant's obligation under his contract was to give to the plaintiff a good and marketable title, free and clear of all incumbrances and burdens other than such as were expressly excepted in the contract. (*Bostwick v. Beach*, 31 Hun, 346; *Burwell v. Jackson*, 9 N. Y. 541; *Leggett v. M. L. Ins. Co.*, 53 id. 395, 398; *Mills v. Bliss*, 55 id. 139; *Cockcroft v. N. Y. & H. R. R. Co.*, 69 id. 204; *M. E. Church Home v. Thompson*, 108 id. 618.) As defendant stated in his terms of sale that the property was to be sold, subject to incumbrances, and proceeded to state what the incumbrances were, but did not mention the *lis pendens* and chancery suits, as matter of fact and law, the enumeration made excluded all matters not mentioned. (*Judson v. Wass*, 11 Johns. 525.) These facts alone would authorize a rescission, for "the purchaser bids on the assumption that there are no undisclosed defects." (*Fleming v. Burnham*, 100 N. Y. 8; *King v. Knapp*, 59 id. 462-468.) There is no such thing as abatement of an action if the cause of action survives. (1 Abb. Dig. 5; Code of 1848, § 121; Code Civ. Pro. §§ 755, 757.) As the plaintiff had actual notice of the claim set forth in the chancery suit the canceling of the *lis pendens* would not relieve her of the effect of such notice. (*Mills v. Bliss*, 55 N. Y. 137; *Holbrook v. N. J. Z. Co.*, 57 id. 632.) The claim of the defendant that he made the sale as assignee, and is not liable personally, is erroneous. He executed the contract individually. (*New v. Nicoll*, 73 N. Y. 127; *Austin v. Moore*, 47 id. 364; *Randall v. Dusenbury*, 7 J. & S. 175; 63 N. Y. 645; *Morgan v. Stephens*, 6 Abb. N. C. 362.)

FOLLETT, Ch. J. A pending action brought to establish title to, or a lien upon, land does not of itself, nor does a duly

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recorded notice of its pendency, make the title defective or create a lien on the land. (*Mahaiwe Bk. v. Culver*, 30 N. Y. 313; *Wilsey v. Dennis*, 44 Barb. 354; *Osbaldeston v. Askew*, 1 Russ. 160; *Bull v. Hutchins*, 32 Beav. 615; 1 Dart on Vendors [6th ed.] 564; 1 Sugden on Vendors [7th Am. ed.] 592, pp. 50, *520.) In *Bull v. Hutchins*, Sir JOHN ROMILLY, the learned master of the rolls, discussing this question, said: "It (the registered notice) was notice of the existence of a suit in chancery, and required all persons dealing with the property to look at the proceedings to see whether it did affect the property or not. Here the *lis pendens* was no incumbrance if Pratt had no right against the property, for it depended on the validity of his claim, for, if his claim were idle, it could not create any incumbrance on the property. A man might file a bill claiming property, alleging that sixty years ago his ancestor was seized in fee; and that, although he had sold the property, yet he had no right to do so. The plaintiff might register this as a *lis pendens*, but could anybody say that this was an incumbrance on the property, or a reason why a purchaser should not complete his purchase? All that the registration of a *lis pendens* does is to require persons to look into the claims of the plaintiff who registers it."

The record before this court is barren of evidence, except such as is contained in the papers filed in the suit in chancery, tending to show that the complainants in that suit ever had an interest in or lien upon the lots. Nevertheless, this case will be decided upon the assumptions: (1) that all of the allegations in the bill were true at its date; (2) that the facts there alleged were found by the referee in this action upon competent and sufficient evidence; and (3), that those facts were sufficient to have entitled the complainants, in 1836, when their bill was filed, to a judgment requiring Mary Kemble, then the owner of the legal estate, to receive the remainder of the purchase-price from the complainants and convey to them the lots. Were it material, the defendant might well complain of these assumptions, for while the admissions made by Mary Kemble in her answer to the bill in chancery, when she was the owner

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and in possession of the lots, are evidence against the defendant, the unadmitted allegations of the complainants in their bill, on which the assumptions are based, are not evidence against him; and, besides, the assumed facts were not found by the referee.

Resting upon these assumptions, could the complainants, if living, or if dead, their successors in interest, in March, 1885, have compelled the defendants in this action to accept of the remainder of the purchase-price and convey the lots? If the answer to this question be doubtful in a legal sense, by reason of resting on a disputed state of facts, or on unascertained facts, the plaintiff was not bound to take the title. Whether, in actions brought to enforce the specific performance of executory contracts for the sale of land, courts should determine doubts respecting the title which depend solely on an unsettled question of law, and decree performance when the unsettled question is decided in favor of the validity of the title, seems not to have been definitely settled. (*Abbott v. James*, 111 N. Y. 673; *Osborne v. Rowlett*, L. R., 13 Ch. Div. 774; *Fry on Spec. Per.* [3d Am. ed.] 435, § 871; *Pom. on Spec. Per.* 281, § 202.) But it is unnecessary to enter into this controversy, for the determination of the validity or reasonableness of the vendee's doubt in the case at bar does not depend upon the decision of an unsettled legal question.

It is assumed, without deciding the question, that a vendee may recover money paid on an executory contract for the sale of land, by proving the title so doubtful that a court would not compel him to take it. Upon this question see, *Burwell v. Jackson* (9 N. Y. 542); *O'Reilly v. King* (2 Robt. 587); *Methodist E. Church Home v. Thompson* (20 J. & S. 321); *Bayliss v. Stimson* (21 id. 225); 1 Darton Vendors (6th ed. 222). A vendee in an executory contract for the purchase of land has not an absolute right to a specific performance of the contract, but such relief is granted or refused according to the circumstances of each case. (*Peters v. Delaplaine*, 49 N. Y. 362; *Day v. Hunt*, 112 id. 191; *Fry on Spec. Per.* [3d Am. ed.] 10, § 25; *Pom. Spec. Per.* p. 4, § 4, p. 47, § 35.) The fact that all

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of the heirs of Arthur McGeer were infants at the date of his death, May 25, 1825, and that the youngest did not become of full age until 1843, is not a legal excuse in an action to enforce a specific performance of the contract, for their failure to perform the contract of their ancestor; and the laches which would have barred such an action by him will bar a like action prosecuted by them. (*Havens v. Patterson*, 43 N. Y. 218).

Paulding having purchased without actual notice of the suit or of the alleged claim of the McGeers, he was a purchaser in good faith and acquired a perfect title unless he was bound by the bill in equity and the accompanying notice of the pendency of the suit. His grantee (the defendant herein) succeeded to all of his rights, and a purchaser from the defendant, though purchasing with notice of the suit and of the claim of the McGeers, would acquire a perfect title free from their claims. (*Bumpus v. Platner*, 1 Johns. Ch. 213; *Varick v. Briggs*, 6 Paige, 323; affirmed, 22 Wend. 543; *Griffith v. Griffith*, 9 Paige, 315; *Webster v. Van Steenbergh*, 46 Barb. 211; *Wood v. Chapin*, 13 N. Y. 509; 1 Story's Eq. Juris. § 410; 2 Pomeroy's Eq. Juris. § 754.) Paulding's title and the title of purchasers subsequent to him, not being weakened or affected by actual notice of the suit, it becomes important to inquire as to the effect of these papers found on file; or for how long a dormant suit and a statutory notice of its pendency binds subsequent purchasers for value and without actual notice?

The rule that a purchaser, *pendente lite*, of the subject of the litigation, if he buys in good faith and without actual notice of the claims of the litigants, is not affected by the suit pending or by the notice of its pendency, unless the suit has been prosecuted with due diligence, was first formulated by Lord BACON.

"12. No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited and is made no party neither by bill nor the order, but where he comes in *pendente lite* and while the suit is in full prosecution and without any color of allowance or privity of the court,

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there regularly the decree bindeth; but if there were any intermission of suit or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice." (Ord. 12 in Chancery; 15 Bacon's Works, 353.) The learned editors of Bacon's Works, Spedding, Ellis and Heath, say that the main body of these ordinances must have existed previous to the time of Lord BACON in some shape or other, written or unwritten. (14 Bacon's Works, 160.) It may be safely asserted that this rule is as ancient as the earliest reported decisions of the Court of Chancery, and it continued to be the rule of the English courts until 1839. (*Preston v. Tubbin*, 1 Vern. 286; *Sorrell v. Carpenter*, 2 P. Wms. 482; *Kinsman v. Kinsman*, Taml. 399; 1 Russ & M. 617; 2 Sugd. on Vendors [7th Am. ed.] 544, 1045*, p. 24; 2 Fonbl. on Eq. 153.) In 1839 it was enacted (Chap. 11 of 2 and 3 Vict., amended by chaps. 15, 18 and 19 Vict.) that a *lis pendens* should not bind a purchaser or mortgagee *pendente lite* without express notice thereof, unless a notice of the pendency of the suit should be registered, and that the registered notice should become void at the expiration of five years unless it should be re-registered. Since the passage of this statute the effect upon purchasers and incumbrancers, *pendente lite*, of a lack of diligence in prosecuting suits, has ceased to be, in England, a living question, and only occasional reference to the subject will be found in modern English law books. We do not find that this rule has ever been questioned in this state; but, on the contrary, it has been approvingly cited and applied. (*Murray v. Ballou*, 1 Johns. Ch. 566; *Hayden v. Bucklin*, 9 Paige, 512; *Myrick v. Selden*, 36 Barb. 15; Will. Eq. Juris. 251.) The courts of other states have asserted and followed the rule. (*Herrington v. McCollum*, 73 Ill. 476, 483; *Watson v. Wilson*, 2 Dana, 406; *Clarkson v. Morgan*, 6 B. Monroe, 441, 448; *Debell v. Foxworthy*, 9 Id. 228; *Erhman v. Kendrick*, 1 Metc. [Ky.] 146; *Petree v. Bell*, 2 Bush. [Ky.] 58; *Ashley v. Cunningham*, 16 Ark. 168; *Mann v. Roberts*, 11 Lea [Tenn.] 57; *Bybee v. Summers*, 4 Oregon, 354.)

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The text writers state the rule as laid down in the cases cited. (2 Pom. Eq. Juris. §§ 634, 640; Wade on Notice, §§ 357, 359; Bennett on *Lis Pendens*, § 418.)

The right of a plaintiff to revive and continue an action against the successors in interest of a deceased defendant may be lost by long delay in making the application, and especially if the successors are purchasers in good faith and if the condition and value of the property have greatly changed, and the only witnesses by which the facts in issue could be established are dead. (*Coit v. Campbell*, 82 N. Y. 509; *Lyon v. Park*, 111 id. 350.) For sixty-one years prior to April 15, 1885, the date fixed for the performance of the contract of sale, the defendant and his grantors had been in the exclusive possession of the lots, claiming to own the entire estate by virtue of recorded deeds, which, in terms, conveyed the entire estate. No move has been made in the chancery suit adverse to the defendants therein since April 26, 1838, sixteen years before Paulding became a purchaser in personal good faith, and more than forty-six years before the plaintiff in this action purchased. Gertrude Kemble Paulding, one of the defendants, died May 25, 1841, forty-four years before the plaintiff's purchase; her husband died April 6, 1860, twenty-five years before the plaintiff's purchase; Gouverneur Kemble died September 18, 1875, nearly ten years before the plaintiff's purchase, and William Kemble died November 5, 1881, nearly four years before the plaintiff's purchase. It is apparent that the condition and value of the property have greatly changed. It was contracted to be sold in 1819 for \$1,200; and it sold to the plaintiff for \$26,100. It is alleged in the bill, and is conceded in the answer in the chancery suit, that the business between Arthur McGeer, the vendee, and Peter Kemble the vendor, was transacted by William Kemble, who is dead. On the 25th day of March 1885, the complainants in the suit in chancery, if living, and if dead, their successors in interest, were, by well settled rules of law, effectually barred from reviving and continuing their suit against the defendant in this action, who then had a good title to the lot; and the plaintiff had no valid reason, in

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law or in equity, for failing to perform her contract. Having held that the suit in chancery, and the papers filed in connection therewith, created no defect in the title, or lien upon the property, it is unnecessary to discuss the failure of the defendant to disclose their existence to the purchaser.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except BRADLEY and HAIGHT, JJ., who dissent.
Judgment reversed.

MAURICE COLEMAN, Respondent, *v.* THE SECOND AVENUE RAILROAD COMPANY, Appellant.

Plaintiff, a passenger in an open car on defendant's street railroad in the city of New York, while the car was in motion, left his seat and stepped out upon the side step, and was proceeding to go forward to another seat when he came in contact with one of the columns supporting an elevated railroad, under which defendant's road was operated, and was injured. In an action to recover damages the testimony was conflicting as to whether the seat plaintiff left was so crowded as to render it uncomfortable for him to remain. Defendant asked the court to charge the jury that, if they believe plaintiff left his seat unnecessarily and voluntarily, and while the car was in motion, without requesting the driver or conductor to stop the same, and when upon the step of the car he swung himself outside the line of the step of the car and, while so doing, came in contact with the column, defendant was entitled to a verdict. The court refused so to charge. *Held*, error; that if, without reasonable cause, plaintiff placed himself outside of the car when in motion, he assumed the hazards of so doing.

Coleman v. S. A. R. R. Co. (41 Hun, 380) reversed.

(Argued June 7, 1889; decided June 28, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 23, 1886, which affirmed a judgment in favor of plaintiff, entered on a verdict.

This action was brought to recover damages alleged to have been caused by defendant's negligence.

The material facts are stated in the opinion.

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Austen G. Fox for appellant. Plaintiff, in doing what he did, in changing his seat, was guilty of negligence as matter of law. (*Holbrook v. U. & B. R. R. Co.*, 12 N. Y. 236; *Todd v. Old Colony R. R. Co.*, 3 Allen, 18; 7 id. 207; *Torrey v. B. & A. R. R. Co.*, 147 Mass. 412; *Pittsburgh, etc., R. R. Co. v. McClurg*, 56 Penn. St. 294; *Pittsburgh, etc., R. R. Co. v. Andrews*, 39 Md. 329; *Dun v. S., etc., R. R. Co.*, 78 Va. 645; *I., etc., R. R. Co. v. Rutherford*, 29 Ind. 82; Beach on Contributory Neg. § 56; *Hickey v. B. & L. R. R. Co.*, 14 Allen, 429, 433; *Adams v. L. R. Co.*, L. R., 4 C. P. 739.)

A. J. Skinner for respondent. Defendant was clearly guilty of negligence in allowing plaintiff to be crowded from his seat by improper arrangements for the seating of passengers, and in not providing the plaintiff, a passenger, when crowded from his seat, with a safe egress therefrom, to a part of the car where he could find such accommodation. (*Campbell v. N. Y. C. & H. R. R. Co.*, 21 N. Y. Week. Dig. 245.) Plaintiff, being a passenger, had a right to assume that the defendant was operating its road, as it was bound to do, with due regard for the safety of passengers, and that the step which the plaintiff was using when injured was a safe and proper appliance, and was there to be used for the purpose testified to. (*Brassel v. N. Y. C. & H. R. R. R. Co.*, 84 N. Y. 241; *Murphy v. N. Y. C. & H. R. R. R. Co.*, 13 N. Y. Week. Dig. 213; *Terry v. Jewett*, 78 N. Y. 339; *Hulbert v. N. Y. C. R. R. Co.*, 40 id. 145; *Ginna v. Second Ave. R. R. Co.*, 67 id. 596; *Spooner v. B. C. R. R. Co.*, 54 id. 230.) Whether the plaintiff was guilty of contributory negligence was a question of fact. (*Massoth v. D. & H. C. Co.*, 64 N. Y. 524; *Hurlbert v. N. Y. C. R. R. Co.*, 40 id. 145; *Ernst v. H. R. R. R. Co.*, 39 id. 61; *Willis v. L. I. R. R. Co.*, 34 id. 670.) Even riding on the platform of steam cars is not necessarily negligence. (*Werle v. L. I. R. R. Co.*, 98 N. Y. 650; *Ginna v. Second Ave. R. R. Co.*, 67 id. 596; *Nolan v. B., etc., R. R. Co.*, 13 N. Y. Week. Dig. 286; *Willis v. L. I. R. R. Co.*, 34 N. Y. 670.) Plaintiff was entitled to comfortable accommodations

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on defendant's car (*Werle v. L. I. R. R. Co.*, 98 N. Y. 651); and was justified in seeking another seat when he was "crowded" in the one he had just taken. (*Willis v. L. I. R. R. Co.*, 34 N. Y. 681; *Dixon v. B. C., etc., R. R. Co.*, 100 id. 179.) Defendant was bound to operate its railroad in as safe a manner as was possible to human care and foresight. (*Brown v. N. Y. C. & H. R. R. Co.*, 34 N. Y. 404; *Bowen v. N. Y. C. & H. R. R. R. Co.*, 18 id. 408; *Hagerman v. W. R. R. Co.*, 13 id. 9.) The court properly declined to charge "that if the jury believe that the plaintiff could have seen the columns by looking, but that he did not look, and was injured by reason of his failure so to do, the defendants are entitled to a verdict." (*Weber v. N. Y. C. R. R. Co.*, 58 N. Y. 461; *Beisiegel v. N. Y. C. & H. R. R. R. Co.*, 40 id. 9; *De Long v. D., etc., R. R. Co.*, 37 Hun, 282; *Thorpe v. N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 403; *Seybolt v. L. E., etc., R. R. Co.*, 95 id. 562.) Detached expressions in a charge cannot properly be made the basis for exceptions. (*Ginna v. Second Ave. R. R. Co.*, 67 N. Y. 596; *Loftus v. U. F. Co.*, 84 id. 455.)

BRADLEY, J. While riding as a passenger in an open car on the defendant's street railroad, the plaintiff received a personal injury, which he charges was occasioned wholly by the fault or negligence of the defendant. The plaintiff entered the car at One Hundred and Twenty-sixth or One Hundred and Twenty-seventh street, in the city of New York, and sat on the rear seat of the car until it approached One Hundred and Fifth street, when he left his seat and stepped out onto the side step of the car, and was proceeding to go forward to take another seat in the car, when his head came in contact with one of the posts or supporting columns of the elevated railroad, under which the defendant's road was operated, and in that manner received the injury. The distance between the car and the post, as represented by the evidence, was from one foot eight inches to two feet. The questions whether the defendant was chargeable with negligence in the matter, and

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whether any negligence on the part of the plaintiff contributed to produce the injury, were submitted to the jury. Thereupon the defendant's counsel requested the court to charge the jury that if they believed "that the plaintiff left his seat unnecessarily and voluntarily, and while the car was in motion, and without requesting the driver or conductor to stop the same, and when upon the step of the car he swung himself outside the line of the step of the car, and while so doing came in contact with the column of the elevated railway, the defendant was entitled to a verdict." The court declined other than as charged and exception was taken to such refusal. The evidence was such, as a whole, to permit the jury to find in the affirmative the proposition presented. While the evidence of the plaintiff tended to prove that he was crowded from his seat or in such manner as to render it uncomfortable for him to remain there, and that he was proceeding to obtain another when he was injured, there was evidence given on the part of the defendant to the effect that the two rear facing seats were not full at the time in question, but that when the plaintiff left his seat there was room in them for two or three more persons. Whether the plaintiff was justified in leaving his seat and going outside the car to seek another seat in it was a question of fact for the jury. The seats in railway cars are provided for the passengers to occupy. If, without reasonable cause they leave the car or place themselves on the outside of it when in motion, they assume the hazards of so doing. (*Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135; *Ginna v. Second Ave. R. R. Co.*, 67 id. 596; *Dixon v. Brooklyn City & N. R. R. Co.*, 100 id. 171; *Todd v. O. C. & F. R. R. Co.*, 3 Allen, 18; 7 id. 207; *Hickey v. B. & L. R. R. Co.*, 14 id. 429; *Torrey v. B. & A. R. R. Co.*, 147 Mass. 412; *P. & C. R. R. Co. v. McClurg*, 56 Penn. St. 294; *Indiana, etc., R. R. Co. v. Rutherford*, 29 Ind. 82; *Pittsburgh, etc., R. R. Co. v. Andrews*, 39 Md. 329; *Dun v. Seaboard, etc., R. R. Co.*, 78 Va. 645).

The cause which may justify a passenger, without the imputation of fault on his part as against the carrier, in leav-

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ing his seat and going outside the car and occupying, temporarily or otherwise, a position there while it is in motion, must be dependent upon the occasion and circumstances which induce or impel him to do so. We are now dealing with the situation presented by the evidence in the present case. The plaintiff asserts that the seat which he occupied became so crowded as to render it uncomfortable for him to remain in it. This, so far as appears, seems to have been the only reason which induced him to seek another seat, and to proceed in the manner he did to reach it. Upon his evidence the conclusion was permitted that he had reasonable cause for leaving his seat to obtain another, and that it was necessary for his comfort to do so. And it is upon that assumption that he may be relieved from the charge of contributory negligence. But if he unnecessarily and voluntarily left his seat and proceeded onto the step, and there came in contact with the column of the elevated road in the manner stated in the proposition, which the court was requested and declined to submit to the jury, it is difficult, in view of the evidence, to see that the plaintiff was entitled to recover. Upon that assumption of fact there was no impelling cause, which justified his act of going outside the car and taking the hazard from which resulted the injury. In that case the consequence of the situation in which he placed himself came from his own fault, and he was chargeable with contributory negligence. The refusal of the court to charge as so requested, therefore, was error, unless the charge, as made, covered such proposition so far as the court could properly be required to submit it to the jury. The question of negligence of the plaintiff was submitted to the jury in general terms. Although the general proposition charged in that respect may be deemed to have embraced within it all the causes to which the plaintiff's negligence may have been attributable, the defendant had the right to have the jury instructed that a state of facts within those which there was evidence tending to prove, and which, if found by them, would, as a matter of law, constitute a defense on the ground of negligence. This was the apparent purpose

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of the request. And it was not, in substance or effect, expressed in the instruction given by the charge of the court to the jury. As the case is presented by the record before us, the consideration of no other question is deemed necessary for the purpose of a new trial.

For the error in refusing to charge as so requested the judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except BROWN and VANN, JJ., who dissent on the ground that the substance of the request discussed in the opinion of the court is covered by the general charge and by the response of the trial judge to the other requests.

Judgment reversed.

MEMORANDA

OF THE

*CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.*

Rose Mullen, an Infant, etc., Appellant, *v.* Joseph T. Perkins, Respondent.

(Argued March 18, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made the fourth Monday of April, 1888, which affirmed a judgment in favor of defendant, entered upon an order dismissing the complaint on trial.

Hugo Hirsh for appellant.

Albert G. McDonald for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

EDWARD KANE, Appellant, *v.* CITY OF BROOKLYN et al., Respondents.

CHARLES O'NEIL, Assignee, etc., Appellant, *v.* SAMUEL NAGLE, Respondent.

THE PEOPLE ex rel. JESSE CARTER, Appellant, *v.* STEPHEN B. FRENCH et al., Police Commissioners, etc., Respondents.

THE appeals in these cases were dismissed under Rule 21.

In the Matter of the Final Accounting of SAMUEL W. PERRY,
Deceased, Assignee, etc., by REBECCA V. PERRY et al., as
Executors, etc., Respondents, v. ALEXANDER FRASER et al.,
Appellants.

(Argued March 11, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 15, 1887, which affirmed a decree of the county judge of Chemung county upon a final accounting by plaintiffs, as executors of a deceased general assignee.

Roswell R. Moss for appellants.

Gabriel L. Smith for respondents.

Agree to affirm on opinion of court below.
All concur, except FOLLETT, Ch. J., not sitting.
Judgment affirmed.

LEBEUS B. WARD, Respondent, v. THE NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, Appellant.

(Argued March 11, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the Supreme Court, entered upon an order which affirmed a judgment in favor of plaintiff, entered on a verdict directed by the court.

Leon Abbott for respondent.

Judgment affirmed by default, with ten per cent on the amount of original judgment as damages by way of costs.

All concur.

Ordered accordingly.

GEORGE F. VIETOR et al., Appellants, v. GEORGE D. NICHOLS et al., Respondents.

(Submitted March 11, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 15, 1888, which affirmed a judgment in favor of defendants, entered on an order dismissing the complaint.

Blumenstiel & Hirsch for appellants.

Wheeler H. Peckham and *Jabish Holmes, Jr.*, for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

MARY J. COLBURN, Respondent, v. THE TRUSTEES OF THE VILLAGE OF CANANDAIGUA, Appellant.

(Argued March 14, 1889; decided March 26, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 14, 1888, which affirmed a judgment in favor of plaintiff, entered on a verdict and an order denying a new trial.

John Gillette for appellant.

James C. Smith for respondent.

Agree to affirm ; no opinion.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Judgment affirmed.

LEON LEOB, as Assignee, etc., Appellant, *v.* PHILIP LEVIN, Respondent.

(Submitted March 15, 1889; decided March 26, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 19, 1884, which reversed a judgment in favor of plaintiff, entered upon the report of a referee and directed a new trial.

Baker & Schwartz for appellant.

George U. Loveridge for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

GEORGE C. GENET, Appellant, *v.* THE CITY OF BROOKLYN, Respondent.

(Argued March 18, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 27, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The case is reported on former appeals. (94 N. Y. 645; 99 id. 296.)

The court here state, in substance, that the questions sought to be raised by the appellant have been already decided in the former appeals, and that the findings and decision here are in accord with the principles there laid down.

George C. Genet, appellant, in person.

D. D. Whitney, Jr., for respondent.

POTTER, J., reads for affirmance.

All concur, *BROWN*; *J.*, concurring in result.

Judgment affirmed.

THE TOWN OF TAYLOR, Appellant, *v.* ELISHA BROWN,
Respondent.

(Argued March 12, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 10, 1888, which affirmed a judgment in favor of defendant, entered on a decision of the court on trial at Special Term.

R. H. Duell for appellant.

Isaac S. Newton for respondent.

Agree to affirm; no opinion.

All concur, except FOULLETT, Ch. J., not sitting.

Judgment affirmed.

JOSEPH DISHER, Respondent, *v.* THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued March 19, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1886, which affirmed a judgment in favor of plaintiff, entered on a verdict, and affirmed an order denying a motion for a new trial.

James F. Gluck for appellant.

John T. Murray for respondent.

Agree to affirm; no opinion.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Judgment affirmed.

HELEN E. EDWARDS, Respondent, *v.* THE SCHOHARIE COUNTY NATIONAL BANK AND WILLIAM C. LAMONT, Receiver, etc., Impleaded, etc., Appellants.

(Argued March 20, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the first Tuesday of February, 1888, which affirmed a judgment in favor of plaintiff, entered on the report of a referee.

E. Countryman for appellants.

Nathaniel C. Moak for respondent.

Agree to affirm ; no opinion.

All concur, except POTTER and PARKER, JJ., not sitting.
Judgment affirmed.

EDMUND R. MORSE, Respondent, *v.* GEORGE H. MORRISON,
Appellant.

(Submitted March 27, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 5, 1886, which affirmed a judgment in favor of plaintiff, entered on a verdict.

Robert Sewell for appellant.

John J. Thomasson for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

In the Matter of the Application of CHARLES DENISON et al.,
Stockholders of the Grocers' Bank of New York City, for
the Appointment of a Receiver.

A sale made by a duly appointed receiver of a state bank, pursuant to and upon terms expressed in an order of the Supreme Court, of a judgment, part of the assets of the bank, is a judicial sale, and the court may compel, by order, a specific performance of the contract of sale.

A confirmation of the contract of sale is not a requisite to its consummation, and it is not material whether the sale was public or private.

(Argued March 29, 1889; decided April 16, 1889.)

APPEAL by Thomas B. and John R. Rand from an order of the General Term of the Supreme Court in the first judicial department, which affirmed an order of Special Term requiring said appellants to perform a contract alleged to have been made by them with Stephen V. White, as receiver of the Grocers' Bank, appointed in these proceedings, for the purchase by said appellants of said receiver of a judgment recovered by the bank against one More.

Two questions were presented on this appeal: First. As to whether the contract of sale was, in fact, made. Second. Was the sale a judicial one? The court held the evidence is sufficient to establish that the contract was made. As to the second point, the court say:

"It is urged by the learned counsel for the appellants that the sale was not judicial, because the receiver was not appointed for the specific purpose of making it; that, in doing so, he did not carry into effect any decree of the court directing a sale; that his authority was merely to make the contract for himself as receiver, and not on behalf of the court. And, further, that it could not have the judicial quality until it became the act of the court by its confirmation. This last proposition may have had some force if it could be assumed that confirmation of the agreement of sale was requisite to its consummation, as may be the case where the efficiency of such a contract is expressly or impliedly made dependent upon the approval of the court. (*Williamson v. Berry*, 8 How. [U. S.] 496, 546.) But in this case no confirmation was requisite. The terms of

the sale, as authorized and as represented by the contract, were expressed in the order. And in making the agreement he represented the court. He was the instrument or officer of the court, and through him the sale may be deemed as made by it. No further action of the court, therefore, seems to have been necessary to consummate the sale. (*In re Van Allen*, 37 Barb. 225; *Atty.-Gen. v. Guardian Mut. Life Ins. Co.*, 77 N. Y. 277; *Atty.-Gen. v. North Am. Life Ins. Co.*, 89 id. 103.) It is not important, for the purposes of the question, whether the sale be public or private, only that it be made by the receiver pursuant to the direction or authority given by the court. It then has the character of a judicial sale. And the party making it subjects himself to the jurisdiction of the court, and may be required to complete it. (*Cazet v. Hubbell*, 36 N. Y. 676; *In re Atty.-Gen. v. Continental Life Ins. Co.*, 94 id. 199.) This was the situation of the appellants in the present case. The motion was properly entertained by the court below. And no rule of law was violated by the result there given to it.

"The order should be affirmed."

Nathaniel C. Moak for appellants.

B. F. Blair for respondent.

BRADLEY, J., reads for affirmance.

All concur.

Order affirmed.

THE THIRD NATIONAL BANK OF BUFFALO, Respondent. *v.*
ITTAI J. ELLIOTT, as Sheriff, etc., Appellant.

(Argued March 22, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 22, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court, and affirmed an order denying a motion for a new trial.

William H. Henderson for appellant.

Adelbert Moot for respondent.

Agree to affirm; no opinion.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.

Judgment affirmed.

**CHARLES C. P. CLARK, Respondent, v. NELSON ROBINSON et al.,
Appellants.**

(Argued March 27, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 20, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

Thomas Thacher for appellants.

George T. Clark for respondent.

Agree to affirm; no opinion.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

JOHN HARR, by Guardian, etc., Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued March 28, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 17, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for personal injuries to plaintiff, alleged to have been the result of defendant's negligence.

The question discussed here was as to the sufficiency of the evidence to authorize the submission of the question of defendant's negligence and of contributory negligence on the part of the plaintiff to the jury. After a full consideration of the evidence the conclusion of the court was, that the case was properly submitted to the jury.

Frank H. Hiscock for appellant.

William Kennedy for respondent.

POTTER, J., reads for affirmance.

All concur, except FOLLETT, Ch. J.; not sitting.

Judgment affirmed.

GEORGE W. MENTZ, Respondent, *v.* JOHN LAYCOCK et al.,
Appellants.

(Argued April 15, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 17, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

Frank M. Loomis for appellants.

Abram Bartholomew for respondent.

Agree to affirm; no opinion.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Judgment affirmed.

FRANKLYN BASSFORD, Respondent, *v.* HERMANN OELRICHS,
Appellant.

(Argued April 16, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

made the second Monday of February, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion to set aside verdict and for a new trial.

William Hildreth Field for appellant.

Thomas S. Bassford for respondent.

Agree to affirm; no opinion.

All concur, except BROWN, J., not sitting.

Judgment affirmed.

**ANDREW F. KINDBERG, Respondent, v. ALVAH MUDGETT,
Appellant.**

(Argued April 17, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 10, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court.

William S. Maddox for appellant.

Henry H. Spelman for respondent.

Agree to affirm; no opinion.

All concur, except BROWN, J., not sitting.

Judgment affirmed.

**THE MANUFACTURERS AND TRADERS' BANK, Respondent, v.
JOSEPHINE W. WINSLOW, Appellant.**

(Argued April 17, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made June 16, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court.

L. N. Bangs for appellant.

John G. Milburn for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

NATHAN JOHNSON, Respondent, v. WILLIAM R. SOPER et al., Appellants.

(Argued April 18, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

Edward P. Wilder for appellants.

Isaac N. Mills for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOHN J. LANDERS, Appellant, v. THE FRANK STREET METHODIST EPISCOPAL CHURCH, of Rochester, Respondent.

Where the exercise of corporate acts is vested in a select body, an act done by the persons composing that body, in a meeting of all the corporators, is not a valid corporate act.

(Argued March 22, 1889; decided May 8, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 17, 1886, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial.

This action was brought by plaintiff, a minister of the Meth-

odist Episcopal Church, to recover an alleged balance of salary due him as defendant's pastor.

The case is reported on a former appeal. (97 N. Y. 119.)

The court here held that the evidence was substantially the same on the second trial as on the first; that plaintiff failed to show that his salary was fixed as prescribed by the act for the incorporation of religious societies (§ 48, chap. 60, Laws of 1813); it appeared it was fixed by the quarterly conference, whose action was not ratified or adopted by a majority of the qualified voters, and by a majority of defendant's trustees, as required by the act, and, therefore, that defendant was properly nonsuited.

It appeared that a meeting of the church society was held in September, 1873. The following is an extract from the opinion in reference to that meeting, and the effect of the action then taken:

"Assuming that the meeting of September, 1873, was held pursuant to a regular notice, what was then done by the qualified voters toward fixing the salary of the plaintiff? No organization was effected, no motion made, no vote taken, no record of the meeting kept. It seems to have been a social rather than a business meeting, for refreshments were first served. The plaintiff then made some pleasant remarks not of a business character, and finally said that the amount to be provided for was \$2,000 for the pastor's salary. He then continued, 'I wish to know whether you are satisfied with that, and also whether it shall be paid to me month by month. I can only repeat that it is for you to act in the matter and do what is best for your own interest. If you do not we shall part. If there is a single person present who is dissatisfied with this, I wish you to say so fully and frankly.' Several speeches were made approving the plaintiff's proposal, and at last one gentleman said: 'It is clear that we are of one mind in this matter, and to save time I propose that a subscription be prepared and circulated among those present and that every one pledge himself to what he is willing to give monthly toward the pastor's salary.'

"A subscription paper was then prepared with the following

heading: 'We, whose names are hereto signed, promise to pay monthly the sums set opposite our names towards payment of the pastor's salary,' and various persons, including all of the trustees but one, signed it and added the sum that they were willing to pay. The trustees signed as individuals only, each binding himself personally to pay a certain amount. No other action was taken at the meeting and no resolution or motion was passed.

"No vote, formal or informal, was called for or taken, and nothing was determined by a majority of voices. The request of the plaintiff that if 'a single person' was dissatisfied he should say so 'fully and frankly,' was simply an invitation to such person to express his views in the form of a speech. There may have been many who were dissatisfied who did not wish to say so in that way. Those who spoke, perhaps a dozen in number, were in favor of the plaintiff's proposition, but what was the opinion of the hundred who did not speak? What assurance is there that if a vote had been taken the proposition would not have been defeated?

"We do not think that any action was taken by the qualified voters at this meeting. All that was done was by the voluntary action of individuals. The judgment or will of a majority of the qualified voters, as an aggregate body, was not ascertained. No question was put to them.

"The proper way to ascertain the wishes of a majority of a deliberative assembly is by a vote of some kind. It cannot be assumed, from what was said by the plaintiff and others, that those who said nothing assented to his proposal. Silence in such a body under such circumstances does not give consent.

"The action of those who were trustees was not official, but personal in its character. Where the exercise of corporate acts is vested in a select body, an act done by the persons composing that body, in a meeting of all the corporators, is not a valid corporate act. (*Cammeyer v. United German Luthern Churches*, 2 Sandf. Ch. 208; *Constant v. Rector, etc., of St. Alban's Church*, 4 Daly, 305.)

"At the meeting held in December, 1873, action was taken upon the resignation of the plaintiff, but nothing was done in

relation to his salary. There was no ratification by the trustees, because there was nothing to ratify and no attempt was made to ratify any supposed action by the qualified voters. The trustees do not appear to have made any payment to the plaintiff during either year. The ecclesiastical officers seem to have taken entire charge of that subject.

"On the first appeal to this court it was held that as the plaintiff officiated upon the appointment of the bishop, and his salary was fixed by the quarterly conference, and was to be raised by the stewards, all ecclesiastical authorities, the fact that the defendant received his services raised no implication of any promise to pay.

"As the facts presented upon the two appeals, although differing somewhat in details, are substantially the same, due effect can be given to the decision of the former appeal only by an affirmance of the judgment."

John S. Lambert for appellant.

Edward Webster for respondent.

VANN, J., reads for affirmance.

All concur, except *BRADLEY* and *HAIGHT, JJ.*, not sitting.

Judgment affirmed.

**HENRY M. ISAACSON, Respondent, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.**

(Submitted April 19, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 1, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

Frank Loomis for appellant.

Horace E. Deming for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MARGARET BOYLE et al., Respondents, v. SABRA LAWTON et al.,
Appellants.

(Submitted April 26, 1889; decided May 3, 1889.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made the first Tuesday of January, 1886, which affirmed an order of Special Term denying a motion to set aside the taxation and allowance of plaintiffs' costs.

James G. Johnson for appellants.

Ansley & Davie for respondents.

Agree to affirm; no opinion.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Order affirmed.

THOMAS C. CLARK, Appellant, v. JOSEPH BLUMENTHAL et al.,
Respondents.

(Argued April 26, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 3, 1886, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial without a jury.

Gilbert R. Hawes for appellant.

Joseph Ullman for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

SAMUEL BURLING et al., Appellants, *v.* THE BOARD OF EDUCATION OF THE CITY OF BROOKLYN et al., Respondents.

(Argued April 26, 1889; decided May 8, 1889.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made June 28, 1886, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

Reuben H. Underhill for appellants.

F. E. Dana for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent, *v.* COLLIS P. HUNTINGTON, Appellant.

[114b 631]
[134 536]

A lessee in possession is estopped from contesting with his lessor the validity of the contract under which he has acquired possession.

(Argued April 22, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made July 6, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to recover a quarter's rent of a pier in the city of New York, alleged to be due.

On April 27, 1883, the department of docks sold, pursuant to advertisement, the right to collect and retain wharfage on said pier for the term of ten years from May first thereafter.

By the terms of sale the purchaser was required to agree to execute a lease, prepared upon the printed forms adopted by the department, with sureties to be approved by it; he was to pay rent quarterly in advance, and, at the time of sale, to

pay twenty-five per cent of the annual rent, the same to be forfeited if he did not execute the lease and bond, as required, within five days after being notified that they were ready for signature. Defendant was the successful bidder, and paid the twenty-five per cent. He also executed and delivered to the department an instrument, by which, after setting forth the purchase, subject to the terms and conditions of the notice, he agreed to execute the lease when notified that it was prepared and ready. The instrument also stated that it was understood and agreed that, until the lease was executed, the conditions and covenants contained therein should be binding and of the same effect as though the lease was executed.

The following is the concluding portion of the opinion:

"The counsel for the appellant insists that, in so far as the writing stipulated that until the execution of the lease the purchaser should be bound by the conditions and covenants of the lease examined, and that it should be as binding and of the same effect as though the lease had been signed and executed, it was *nudum pactum*, because not based upon any obligation of the defendant nor upon any consideration moving from the plaintiff or its officers. We do not deem it necessary to pass upon that question in the disposition of this case. By the execution and delivery of such writing, as a whole, the purchaser at least waived an immediate execution of the lease. Subsequently, and on April thirtieth, he sent to the dock department the names of his proposed sureties. May fifteenth, in reply to a letter from purchaser's counsel of the same date, asking to be informed whenever the lease should be ready for examination and execution, the secretary of the dock department, by letter, informed him that the lease was being drafted by the counsel to the corporation, and that as soon as prepared notification would be promptly given. The letter concluded as follows: 'I am also requested to call your attention to the fact that Mr. Huntington is entitled to the wharfage accruing at the pier from May first, instant, and that he ought to have some one attend to the collection of it for him.'

"May twenty-fourth a draft of the proposed lease was sent to the purchaser's counsel for examination. Objection was

made by the purchaser that the lease provided for rent from May first. Subsequently, and on June thirteenth, the department of docks gave to the purchaser formal notice that the lease was ready for execution and requested him to call with his sureties and execute the same. The purchaser refused to execute the lease. Objection was not made that the lease failed to conform to the terms of sale. It was simply insisted that the formal notice to execute the instrument not having been given until June thirteenth, rent could only be charged from that time. The department of docks refused to accede to the claim made by the purchaser, and, on the contrary, insisted that the lease was in exact accordance with the terms and conditions of sale, and the contract of the parties resulting from the purchase thereunder by the defendant, and that to yield to the insistence of the defendant would be, in effect, the making of a new contract for a shorter term than ten years, and, therefore, not authorized by section 716 of the Consolidation Act of 1882, under and by virtue of which the department of docks acquired the power and authority to lease the property in question. The defendant failing in his attempt to induce the dock department to coincide with his expressed views of the legal effect of the contract, as made between the parties, nevertheless, in the early part of August, 1883, took formal possession and entered upon the enjoyment of the right to collect wharfage, and still remained in possession at the time of this trial. The installments of rent due upon the first days of November and February, as provided by the terms of sale, were paid by him, but he refused to pay the installment of rent falling due August first, to recover which this action was brought. We are of the opinion that the defendant having taken possession of the property, and entered upon the enjoyment of the right to collect wharfage solely, by virtue of the contract made with him by the department of docks at the public sale, cannot now be permitted to question the agreement under which he has elected to take the benefits accruing to him as purchaser; that, in an action to recover the stipulated rent, he must be held to be estopped from contesting with his lessor the validity of the contract under which

he has acquired possession of leased property. This question has been so carefully considered in this court in *Whitney Arms Company v. Barlow* (63 N. Y. 62); *Woodruff v. Erie Railway Company et al.* (93 id. 609), and the *Rider Life Raft Company v. Roach* (97 id. 378), as to render further attempt at discussion or the citation of authority superfluous.

"It follows that the judgment appealed from should be affirmed."

Francis Lynde Stetson for appellant.

David J. Dean for respondent.

PARKER, J., reads for affirmance.

All concur.

Judgment affirmed.

THE EMIGRANT INDUSTRIAL SAVINGS BANK, Respondent, v.
THOMAS J. CLUTE, Appellant.

(Argued May 3, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 9, 1885, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This case presented substantially the same questions as and was decided upon the authority of *Clute v. Emmerich* (99 N. Y. 342).

Thomas J. Clute, appellant, in person.

Bartholomew Skaats for respondent.

Per Curiam mem. for affirmance.

All concur, except **PARKER** and **BROWN, JJ.**, dissenting.
Judgment affirmed.

JOSKPH M. NORTHCOP, Appellant, *v.* RATHBONE, SARD & Co.,
Respondents.

(Argued June 4, 1889; decided June 11, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 4, 1886, which affirmed a judgment in favor of defendant, directed by the court at circuit.

Worthington Frothingham for appellant.

G. L. Stedman for respondents.

Agree to affirm ; no opinion.

All concur, except PARKER, J., not sitting.

Judgment affirmed.

DAVID H. SURDAM, Respondent, *v.* JOHN HUDSON, Appellant.

(Submitted June 8, 1889; decided June 18, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made May 1, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

Alex. & A. W. Cumming for appellant.

Canniff & Penrie for respondent.

Agree to affirm ; no opinion.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

THE PEOPLE ex rel. FRANZ KROHN, Appellant, v. WALTER T. MILLER, as Treasurer of the NEW YORK COTTON EXCHANGE, Respondent.

(Argued June 4, 1889; decided June 18, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 6, 1886, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

Purdy Van Vleit for appellant.

Francis M. Scott for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

LUCINDA H. BRUSH, Appellant, v. GEORGE EVANS, Respondent.

(Submitted June 18, 1889; decided June 25, 1889.)

MOTION to dismiss appeal from a judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 3, 1886, which reversed a judgment in favor of plaintiff, entered upon a verdict.

George F. Martens for motion.

Wakeman & Campbell opposed.

Agree to grant motion; no opinion.

All concur, except BROWN, J., not voting.

Appeal dismissed.

CHARLOTTE B. WILBOUR, Appellant and Respondent, *v.* TROW'S PRINTING AND BOOKBINDING COMPANY, Appellant and Respondent.

(Argued June 11, 1889; decided June 25, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 2, 1886, upon a case submitted upon an agreed statement of facts under section 1279 of the Code of Civil Procedure.

Henry Thompson for plaintiff.

Raphael J. Moses, Jr., for defendant.

Agree to affirm; no opinion.

All concur, except BROWN, J., not voting.

Judgment affirmed.

STEPHEN P. NASH et al., Respondents, *v.* SYLVESTER H. KNEELAND et al., Impleaded, etc., Appellants.

(Argued June 11, 1889; decided June 25, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 15, 1886, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

Robert G. Ingersoll for appellants.

John E. Parsons for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

GEORGE B. ROSSMAN, Respondent, v. THE KNICKERBOCKER
ICE COMPANY, Appellant.

(Argued June 12, 1889; decided June 25, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 5, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

Michael M. Forrest for appellant.

R. E. Andrews for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

FRANCIS J. MOISSEN, Appellant, v. ADOLPHE A. KLOSTER et al.,
as Executors, etc., Respondents.

(Argued June 18, 1889; decided June 25, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1886, which affirmed a judgment in favor of defendants, entered upon the report of a referee.

The principal questions presented in this case were in reference to the pleadings and practice, some of which were disposed of on the ground that there were no proper exceptions presenting them ; the others are not considered of sufficient general interest to require a report of the case.

Francis J. Moissen, appellant, in person.

Edward Dooley for respondents.

POTTER J., reads for affirmance.

All concur, except VANN and BROWN, JJ., not voting.

Judgment affirmed.

JOHN C. NICHOLS, Appellant, *v.* ANDREW G. WHITE,
Impleaded, etc., Respondent.

(Argued May 3, 1889; decided June 28, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made June 30, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

Esek Cowen for appellant.

Nathaniel C. Moak for respondent.

Agree to affirm on opinion of PECKHAM, J., at General Term.

All concur.

Judgment affirmed.

EUGENE K. WOOLEVER, Respondent, *v.* THE UTICA, ITHACA AND ELMIRA RAILWAY COMPANY, Appellant.

(Submitted June 19, 1889; decided June 28, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 23, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

James Armstrong for appellant.

Dailey & Bentley for respondent.

Agree to affirm; no opinion.

All concur, except FOLLETT, Ch. J., not voting.

Judgment affirmed.

114 640
134 94

640 MEMORANDA OF CAUSES NOT REPORTED.

RENSSELAER B. WINCHELL, Appellant, v. ARCHIBALD SCOTT et al., Respondents.

(Argued June 20, 1889; decided June 28, 1889.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order which affirmed a judgment in favor of defendants, entered upon the report of a referee.

This action was brought to recover damages for an alleged breach of a contract between the parties, by which defendants agreed to furnish plaintiff with ice for the term of five years. By the contract plaintiff agreed to pay weekly for the ice delivered, and, in case of default, defendants had the option to declare the contract thereafter forfeited. Plaintiff failed to pay for ice delivered from October 17, 1868, to January 1, 1869.

It appeared, and the referee found, that it was defendants' custom to send bills of ice, delivered weekly and also personally, to demand payment; deliveries were continued up to January 1, 1869. On March 10, 1869, defendants demanded payment and served notice in writing of their election to annul the contract. Plaintiff offered to pay on condition that a new company, formed by defendants and some others, would assume the contract and continue the deliveries. Held, that, conceding defendants, by continuing to deliver after default, waived the right to declare the contract annulled, and that plaintiff, if he had paid or offered to pay unconditionally the sums in arrears when demanded on March tenth, might have prevented the forfeiture, yet, having failed so to do, he violated the contract, and so was not entitled to recover.

B. Doran Killian for appellant.

William G. Cooke for respondents.

POTTER J., reads for affirmance.

All concur.

Judgment affirmed.

INDEX.

ABATEMENT AND REVIVAL.

1. The rule of the common law, that an action to recover damages for a personal injury abates on the death of the plaintiff, is not changed by the Code of Civil Procedure except where "a verdict, report or decision" has been rendered upon the issues. (§ 764) *Corbett v. Twenty-third St. R. Co.* 579
2. A nonsuit on trial by jury is not a "decision" within the meaning of said Code, nor is an order of General Term reversing a judgment entered on the nonsuit; that word refers to a decision made by a court on trial without a jury *Id.*
3. A stipulation for judgment absolute, in case of affirmance, given by defendant on appeal to this court from the General Term order of reversal, does not prevent the abatement of the action, where plaintiff dies after the appeal *Id.*
4. The right of the plaintiff, in an action to compel specific performance by the vendor of a contract for the sale of land, to revive and continue it against the successors in interest of a deceased defendant, may be lost by long delay in making the application, especially if the successors are purchasers in good faith, and if the condition and value of the property have greatly changed, and the only witnesses by whom the facts in issue could have been established are dead. *Hayes v. Nourse.* 595

ADVANCEMENT.

The will of H. gave legacies of \$50 to each of his three sons, and di-

rected his residuary estate to be equally divided between his six children. The will contained this clause: "Whatever obligations shall be found that I hold against my sons for whatever I have let them have heretofore shall be considered as my property and shall be considered as their legacy, in whole or in part, as the case may be." At the time of the making of the will the testator was worth \$10,000 over all liabilities; he held notes at that time and at the time of his death against defendant, one of his sons, to the amount of \$900, by their terms payable with interest. Defendant's distributive share of the residuary estate was less than the amount of the notes. In an action upon the notes, *held*, that it was not the intent of the testator to treat the notes as a gift or advancement, but his design was that they should be treated as a legacy to an amount equal to the legatee's share in the estate and as a debt for the residue. *Ritch v. Hawxhurst.* 512

ADVERSE POSSESSION.

Plaintiffs, for several years prior to 1869, had occupied certain real estate as lessees under P.; in that year they acquired P.'s title. P. claimed under two deeds from the comptroller of the state, dated February 14, 1862, and December 12, 1868, given upon sales of the land for taxes, and which purported to convey an absolute estate in fee simple. Plaintiffs continued in possession of this land until the commencement of this action in 1883, which was brought to compel the determination of a claim made by defendant to said real estate adverse to plaint-

iffs' title. The answer denied plaintiffs' title and possession and alleged title in defendant. Defendant claimed under a deed to him, dated October 27, 1881, executed by one S., whose grantor C. held title to the property from November 14, 1854. *Held*, that, as at the time of the execution of the deed to defendant the land was in the possession of a person claiming under a title adverse to defendant's, his deed was void (1 R. S. 782, § 147), and, as against him, plaintiffs were entitled to possession without regard to the question as to the validity of the comptroller's deeds; that if there were such defects in the proceedings to sell the land for taxes as to render those deeds void, the title to the land was still in C., defendant's remote grantor, and upon that title must be founded all proceedings to recover possession from the plaintiffs. *Pearce v. Moore*. 256

a direction that plaintiff separate the allegations charging possession and sale so as to present them as separate and distinct causes of action, and that plaintiff be required to elect upon which one of such causes he would rely; also, to direct a separation of the cause of action based upon the provisions of section 7 from that founded on section 8. *Held*, that these motions were addressed to the discretion of the trial court, and its decision thereon was not reviewable here. *People v. Briggs*. 56

2. In an action by one claiming under a chattel mortgage to determine conflicting claims to the property, orders were granted appointing a receiver and directing him to sell the property and confirming his report of sale. *Held*, that these orders being proper to the action and resting in the discretion of the court, were not reviewable here. *Ostrander v. Weber*. 95
3. Plaintiff's mortgage was given to secure him from liability as indorser upon notes made by the mortgagors. *Held*, the objection that the holder of the notes was not made a party, not having been raised by demur or answer, was not available here. *Id.*

4. After the appointment of plaintiff as receiver in supplementary proceedings against J., the latter conveyed his farm to defendant A. in consideration of an agreement by A. to cancel and discharge a debt due from J. to him, pay all of plaintiff's claims, as receiver, and also pay and discharge certain other debts owing by J. The creditors specified assented to the arrangement. A. paid the amount due upon the judgment plaintiff then represented, together with his claims for costs and expenses, but, before he had paid the other debts named, G., another creditor, obtained a judgment against J., to which the receivership was extended. This action was thereupon brought to have the said conveyance declared fraudulent and void as to J.'s creditors. It appeared that A. had acted in good

ALTERATION OF INSTRUMENT.

Where it is made to appear that a check, indorsed over by the payee, was altered after his indorsement without his consent, the presumption is that it was so made as to vitiate it, as against the indorser, and the burden is upon the party seeking to enforce it to relieve it from the effect of the unauthorized indorsement by showing that it was made by a stranger to the instrument. *Nat. Ulster Co. Bank v. Madden*. 280

— When party not entitled to cancellation of bond because of an alteration therein.

See Town of Solon v. W. S. Bk. 122

APPEAL.

1. The complaint in an action by the dairy commissioner, under the act of 1885 (Chap. 183, Laws of 1885), charged in one count both possession and sale of the prohibited article and violations of sections 7 and 8 of the act. At the opening of the trial defendants moved for

faith, without knowledge of G.'s claim, and that the price agreed to be paid was a full and adequate consideration. *Held*, that the action was one "affecting the title to real property, or an interest therein," within the meaning of the provision of the Code of Civil Procedure (§ 191, sub. 8) limiting appeals to this court, and so the order of General Term granting a new trial was reviewable here although the judgment represented by plaintiff was less than \$500. *Warren v. Wilder.* 209

5. In order to raise any question upon the ruling of the trial court, as to requests to charge, for review in this court the exception must be specific and point out the particular request to which it is intended to apply. *Newhall v. Bartlett.* 399

6. An order setting aside the verdict and granting a new trial where questions of fact in an equity case have been submitted to a jury, is not appealable to this court. (§§ 190, 1847, sub. 2.) *Randall v. Randall.* 499

7. It seems that if the action were triable, as matter of right by a jury, as the motion for a new trial involves questions of fact which may or could have been considered by the General Term, its order would not be reviewable here. *Id.*

8. The record on appeal in an equity action showed that the action was brought to trial at a circuit before a jury: that at the close of the evidence defendants' counsel moved to dismiss the complaint and plaintiff asked to go to the jury upon certain questions of fact. Plaintiff's motion was denied, the complaint dismissed and exceptions ordered to be heard in the first instance at General Term. At General Term an order was entered overruling the exceptions and denying plaintiff's motion for a new trial, and a judgment was then entered which recited the trial, the direction for the dismissal of the complaint, the exceptions thereto, the order that they be heard in the first instance at General Term, the motion for a new

trial and the decision of the General Term thereon, and adjudged that the complaint be dismissed with costs and disbursements. Plaintiff appealed to this court, stating in his notice of appeal that he intended to bring up for review the order of the General Term denying the motion for a new trial. *Held*, that the record presented no question for review upon the merits; that, regarding the proceeding as a trial by the court, no decision was made as required by the Code of Civil Procedure; that there was no authority to direct exceptions in a case triable by the court to be heard in the first instance at the General Term, that proceeding being limited to a case triable by a jury. (§ 1000.) *MacNaughton v. Osgood.* 574.

9. A stipulation for judgment absolute, in case of affirmance, given by defendant on appeal to this court from the General Term order of reversal, does not prevent the abatement of the action, where plaintiff dies after the appeal. *Corbett v. Twenty-third St. R. Co.* 579

— *In action to foreclose mechanic's lien, where other liens are made defendants, "the amount in controversy," within meaning of provision of Code of Civil Procedure limiting appeals to this court (§ 191, subd. 8), is amount due contractor, not to each lienor separately.*

See Powers v. City of Yonkers. 145

— *Where question, not raised on trial, not available on appeal.*

See Merrill v. C. O. Co. 210

— *Upon trial of action to set aside an assessment as illegal, evidence to establish a defect de hors the record not set forth in complaint is improper, and if received under that specific objection the question whether the defect so proved invalidates the assessment is not presented on appeal from judgment sustaining the assessment.*

See O'Reilly v. City of Kingston. 489

— *When evidence is received without objection, and no motion made to strike out, a subsequent objection and exception not available on appeal.*

See Hangen v. Hachemeister. 566

APPLICATION OF PAYMENTS.

When payment is made upon general account without direction as to its application the law applies it to the oldest items. *Nat. Park Bk., N. Y.*, v. *Seaboard Bk.* 28

ARBITRATION.

See AWARD.

ASSESSMENT AND TAXATION.

1. Taxes assessed for the years 1882, 1883, 1884 and 1885 upon certain lots in the city of Brooklyn owned by the relator, being in arrears, he called at the office of the registrar of arrears and asked the clerk charged with that duty to give him all the bills for taxes, etc., against his property, stating that he wished to settle up. He was given the bills for the taxes for 1882, 1883 and 1884, which he paid, but no bill for 1885 was given to him. The registrar subsequently sold the lots for the unpaid taxes of 1885. The relator, as soon as he learned of this, tendered to the registrar the amount of such unpaid tax, which was refused. Held, that under the charter of the city (§ 16, tit. 8, chap. 863, Laws of 1879), it was the duty of the registrar upon the request of the relator to furnish him with a correct statement of all unpaid taxes upon his lots; that the sale was void and the relator was entitled to a *mandamus* to compel the registrar to accept the tax and cancel the sale; also, that as the purchaser had not received a conveyance he was not a necessary party. *People ex rel v. Registrar of Arrears, Brooklyn.* 19

2. It seems where a taxpayer calls upon the proper officer for a statement of all the taxes due from him, receives a statement and pays all of the taxes included therein, and afterwards the land is sold for non-payment of taxes in arrear at the time the statement was furnished, but which were omitted from it by the neglect of the officer or his

clerk, the title of the taxpayer is not divested by the sale. *Id.*

3. In an action to set aside, as illegal and void, an assessment upon lands of plaintiff for paving a street in the city of K., it appeared that by an ordinance of the common council, passed at the same time with the one authorizing the improvement, the grade of the street was declared to be "changed and amended." The city charter (Chap. 150, Laws of 1872, as amended by chap. 429, Laws of 1875), prohibits a change in the grade of a street except upon petition of a majority of the owners of the lineal feet frontage on that part of the street to be graded. No such petition was presented. There was no record of any previously established grade of the street. It appeared that some attempt had been made to establish a grade and to conform the street to it; but that the surface of the street was very irregular, there being low places in which the water would stand, and one side in some places lower than the other side, and the grade was not uniform. When the street was paved it was filled in places. Under the contract for the work the change in the actual surface of the street did not increase the expense, no charge being made for the filling, and the assessment was simply for the paving. The trial court was requested to find, as a fact, that the change of grade did not increase the cost or the assessment on plaintiff's lot; the request was declined as "immaterial." Held, error; that it devolved upon plaintiff to show that she was damaged by the assessment made; also, that a material change in the grade had been effected by the ordinance, the expense of which entered into the assessment; that the conforming of the road-bed necessarily required some grading, but did not necessarily effect a change of the established grade; and that the evidence showed there was no change which increased plaintiff's assessment. *O'Reilly v. City of Kingston.* 439
4. The apportionment it appeared

was made in proportion to the frontage of each lot upon the street; some of the lots were vacant, others occupied by valuable buildings. *Held*, that, as under the charter, it was the duty of the assessors to determine the benefits derived by the owners, in thus determining they acted judicially, and their judgment as to the amount of benefit derived could not be reviewed here unless they acted upon an erroneous principle in making the assessment; that the assessment on each lot, in accordance with the number of feet front, was not necessarily an erroneous principle, if in the judgment of the assessors the owners were benefited in that proportion.

Id.

5. There was a street railway whose tracks were, before the improvement, in, but along the side of the street. The railroad company agreed with the city to and did remove its tracks to the centre and paved the street between its rails. The charter provides that no part of the expense of such an improvement shall be assessed on lands "not bordering on or touching the street." It was objected that the railroad company should have been assessed. *Held*, untenable; that the land occupied by it did not border on or touch the street within the meaning of the charter, it being simply a part thereof. *Id.*

6. The provision of the Code of Civil Procedure (§ 46), providing that a judge shall not sit as such or take any part in the decision of a cause or matter if he is related to any party to the controversy within the sixth degree, refers to a judge, justice or other person holding a court *ex nomine*; it has no application to assessors. *Id.*

7. Said charter provides that the assessment shall be upon the "owners or occupants and upon the land deemed to be benefited;" also, that if an assessor is interested in property liable to be affected by such an assessment, the common council may appoint a freeholder to act in his place. It appeared that the son

of one of the assessors owned one of the lots assessed. Upon it is a hotel and the assessor lived there. It did not appear that the son lived on the premises, or who ran the hotel. It was claimed that the assessment was void because said assessor was interested. *Held*, untenable; that the evidence failed to show that the assessor was an "occupant" within the meaning of the charter, or that he was interested in the property assessed. *Id.*

8. The latter alleged defect was not set forth in the complaint. It was proved by evidence *de hors* the record, under objection by defendant's counsel. *Held*, that the evidence was improperly received; and that the question, therefore, was not properly presented on appeal. *Id.*

9. The provision of the charter of the city of Brooklyn (§ 9, tit. 10, chap. 868, Laws of 1873) which declares that the assessment-roll "shall be duly sworn to by at least two of the assessors * * * to the effect that they have together personally examined within the year past each and every lot or parcel of land," etc., does not require that all of the verifying assessors should depose that they together examined the property; it is sufficient if at least two of them swear that they did so examine. *Kane v. City of Brooklyn.* 586

10. Where, therefore, a roll was verified by all of the assessors, each severally deposing that at least two of them "have together personally examined," etc., *held*, that this was a sufficient compliance with the statute; that it was not necessary to identify the two who made the examination. *Id.*

11. The provision of the act of 1878, relative to the collection of taxes and assessments in the city of Brooklyn (Chap. 346, Laws of 1878), which requires that "the annual taxes shall be confirmed by the common council, the tax-roll signed by the board of supervisors, and the books delivered to the collector of taxes on or before the fifteenth

day of November," was not designed to change the method of assessing the annual taxes, but to fix the time within which all the requisite steps shall be taken, and the reference to the signing of the roll by the board of supervisors is simply to the signing of the warrant annexed to the roll as prescribed by the Revised Statutes. (1 R. S. 396, § 87.) *Id.*

12. Where, therefore, it appeared that a roll was signed by a majority of the then board of supervisors, and was duly approved and confirmed by resolution of the board, *held*, that this met the requirements of the statutes. *Id.*

13. It is not essential to the validity of a return, made by the registrar of arrears, of taxes levied in the previous year remaining unpaid, that it shall be authenticated by a written certificate signed by the collector. *Id.*

14. A mistake in the printed list, prepared by the registrar, in the name of the street on which the property to be sold is situated, does not affect the validity of the sale; it is sufficient if the ward, block and lot numbers be stated. (Chap. 405, Laws of 1885.) *Id.*

15. The notice of sale, in pursuance of which plaintiff's property was sold, was dated and first published on March fifteenth; the day of sale specified was April fourteenth. *Held*, that this was a compliance with the statutory provision (§ 1, chap. 405, Laws of 1885) requiring the sale to be at a time "not less than thirty days after the first publication." *Id.*

ASSESSORS.

See ASSESSMENT AND TAXATION.

ASSIGNMENT.

1. Where one takes title to personal property simply to secure himself

as surety upon a bond of his assignors, he has no interest in the property that he can sell until after a breach in the condition of the bond. His title is both personal and contingent, and by an assignment before the contingency named has happened, he parts with his security without transferring any right to his assignee. *Comley v. Dazian.* 161

2. In an action upon an undertaking, given on appeal from a judgment, brought by plaintiff as assignee of the judgment, the defense was that S., plaintiff's assignor, obtained the judgment as trustee of an express trust, for R., and that L., the judgment-debtor, had paid the judgment to R., who acknowledged satisfaction thereof. The assignment of the judgment to plaintiff was executed and recorded prior to the alleged payment and satisfaction. Neither the defendants N. or S. had notice of the assignment at the time of payment other than that given by the assignment record. *Held*, that the defense was not available; that, as S. brought the action, wherein the undertaking was given, in his own name, not as agent, the question as to his right to recover was an issuable fact, and was necessarily determined in that action, and defendants were concluded by their agreement to pay the judgment, if it was affirmed, from again bringing into question any issuable facts so determined; that, conceding the judgment recovered by S. was for the benefit of R., S. was the legal owner, and although, had the settlement been effected with the latter while S. was such legal owner, he would have been bound by it, yet he had the power to sell and transfer the judgment, and having done so, R.'s interest therein ceased and plaintiff, the assignee, became the legal and equitable owner, and his rights as such were not affected by the payment to R. *Seymour v. Smith.* 481

— When defendant not entitled to inquire as to whether transfer to plaintiff of claim sued upon was with consideration.

See Stettheimer v. Tone.

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ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. One H. entered into a contract with defendant to furnish the latter all the boxes of a character specified it might require for one year from January first, at prices named; in case of failure it was provided that defendant might purchase the boxes it required in open market without notice, and charge H. with the excess over the contract-prices. On September 8, 1885, H. made a general assignment to plaintiff for the benefit of creditors; he claimed the right and continued to supply the boxes required until October fifth, when he informed defendant that he would be unable to fill further orders until an arrangement should be made of his affairs. Defendant thereupon contracted with another party to furnish the boxes required at prices in excess of those under the contract with H. Afterwards, at plaintiff's request, defendant permitted him to deliver such further boxes as should be made from lumber already cut for the purpose. In an action to recover for the boxes delivered subsequent to the assignment defendant set up, and was allowed, as a counter-claim, damages for non-performance of the H. contract. *Held*, no error; that while plaintiff had no power as assignee, to proceed in the performance of the contract without the consent of those beneficially interested in the trust, or the direction of the court, having adopted and proceeded to perform it, defendant's damages were available to him as a counter-claim. *Patton v. Royal B. P. Co.* 1.

2. The facts stated in a case submitted under the Code of Civil Procedure (§ 1379) were substantially these: The firm of M.'s Sons were the financial agents of the plaintiff. H., one of said firm, was also plaintiff's treasurer. The firm kept the transfer book, paid all dividends to plaintiff's stockholders and frequently was in advance to it, but neither charged nor allowed interest, and on plaintiff's books the account was kept in the name of the firm; it kept no account in the name of H. as treasurer. Re-

mittances made by plaintiff were at one time made to the order of H., but at his request they were thereafter made direct to the order of the firm. Plaintiff's annual printed reports stated its funds were in the hands of the firm; there was no statement showing funds in the hands of the treasurer. The firm failed and made an assignment for the benefit of creditors without preferences. The members of the firm also made assignments of their individual estates. At this time the firm books showed an indebtedness to plaintiff of \$94,000. The firm assets were not sufficient to pay its debts. The individual estate of H. would pay his individual indebtedness, including the balance due plaintiff, if that should be decided to be an individual, not a firm indebtedness. *Held*, that the statement failed to show a receipt by H., as treasurer, of the moneys in controversy, but the indebtedness appeared to be simply that of the firm; and that plaintiff was only entitled to share with other firm creditors in the surplus of the individual assets of H. after payment of his individual indebtedness. *N. Y., P. & B. R. R. Co. v. Dixon.* 80

3. While one or more members of a copartnership cannot execute a general assignment for the benefit of creditors, with or without preferences, without the consent of all, if it appears by the acts or declarations, before or after the assignment of the member or members who did not sign, that he or they assented to making it, or that it was made by his or their authority, it is valid. *Klumpp v. Gardner.* 153

4. Defendants D. and G. were copartners; the firm being in straitened circumstances G. started for Australia, with a view of making sales of goods there in sufficient amounts to relieve it from its embarrassment, leaving D. in charge of the business. G. wrote D. from San Francisco urging him to continue the business and get extensions of time, but "should you have to make an assignment" then to make certain persons named preferred creditors and put in certain speci-

fied stocks as assets. The pressure from creditors became so great that G. subsequently made a general assignment of the firm assets, executing it in the name of the firm, in the name of G. by D. "by authorization," and in his own name, and acknowledging it. *Held*, that the letter was to be understood as giving D. authority to execute the assignment at any time when it should become necessary during G.'s absence; and so, the assignment was valid; that while the attempted execution and acknowledgment in the name of G. was invalid, it might be treated as surplusage. *Id.*

5. D. had, before making the assignment, paid the debts due the persons G. had requested him to prefer. *Held*, that the fact they could not be preferred did not terminate the authority to make the assignment. *Id.*

6. The firm of E. & H. executed to plaintiff H. an instrument, in form a bill of sale of all of the firm property. H. executed an instrument in return, which stated that, in consideration of the sale, he agreed to cancel an indebtedness of the firm to him, to pay certain specified debts of the firm "and such other sums for wages, merchandise recently purchased and other claims," as the firm might direct, "as entitled to a preference not exceeding \$750." Defendant, as sheriff, levied upon and took the property from the possession of plaintiffs by virtue of attachments issued against the firm. In an action to recover possession defendant claimed that the transfer was, in effect, an assignment for the benefit of creditors, and was fraudulent and void upon its face because of the right reserved to the firm to direct what claims should have the preference for the purpose of the payment of the \$750. *Held*, that the contract, as evidenced by the terms of the two instruments, which were to be taken and construed together, did not necessarily import such an assignment, but might be construed as an absolute sale, for which the cancellation of his own debt and the agreement to pay the sums spe-

cified was the consideration; that, although the firm was insolvent, H. was at liberty to purchase the property for the purpose of obtaining payment of the debt due him; and if the sale was made absolutely and in good faith, its validity was not affected by the fact that the vendor reserved the right to direct upon what debts of theirs the \$750 surplus of consideration was to be paid; that the nature of the transaction depended upon the intent of the parties thereto, which, upon the evidence, was properly a question of fact for the jury. *Hine v. Bowe*. 350

7. The court refused a request of defendant's counsel to charge that if the firm was at the time insolvent, and by the bill of sale intended to make an assignment for the benefit of creditors, it was void. *Held*, no error, as the request did not embrace any suggestion that plaintiff H. was in any respect in privity with the firm in such intent; that this was essential, as he could not be prejudiced by an intent on their part to create a trust which the terms of the instruments did not import, unless he was in some way chargeable with participation in their intent. *Id.*

AUDITORS (TOWN).

1. The term "audit," as applied to the action of a board of town auditors, means to hear and examine; it includes both the adjustment or allowance and the disallowance or rejection of an account. *People ex rel. v. Barnes*. 317

2. As a general rule no claim against a town is obligatory upon or enforceable against it until it has been audited and allowed by said board. Its jurisdiction over such claims is not only original but its decision is conclusive until reversed or modified by another court in the manner prescribed by law, i. e., in proceedings by *certiorari*. *Id.*

3. In proceedings by *mandamus*, instituted by a commissioner of

highways, to compel the board of town auditors to audit certain claims against the town for costs awarded against the relator and paid by him in actions brought by him as such commissioner, and for moneys expended by him in that capacity, it was admitted that the claims had been presented to former boards and rejected by them on the ground that the town was not legally liable to pay them. *Held*, that the former adjudications were conclusive, and that until reversal they formed a bar to a reauditing of the bills and to the application for a *mandamus* to compel it. *Id.*

4. Neither the Revised Statutes (1 R. S. 357, § 8), nor the Code of Civil Procedure (§ 1981), impose an absolute liability upon towns for all judgments recovered against a sole commissioner of highways in actions prosecuted by him in his official name. *Id.*
5. The board of town auditors have power to examine and determine whether the action was one the commissioner had the right to prosecute in his official character and whether it was carried on in good or bad faith. *Id.*
6. In determining as to the liability of the town the board acts judicially, and its action cannot be reviewed or controlled by the courts through a writ of *mandamus*. *Id.*

AWARD.

1. The power of arbitrators is confined strictly to the matters submitted to them, and if they exceed that limit, the award will, in general, be void. *Dodds v. Hakes*. 260
2. It may be shown by oral evidence, in defense against or avoidance of an award, that the arbitrators acted in excess of their jurisdiction.
3. Defendant leased to plaintiff a store, but was unable to give possession. Plaintiff claimed dam-

ages, and it was submitted to arbitrators to determine "what the damages should be." In an action upon the award it appeared the arbitrators allowed a gross sum, basing their award upon the value of the lease and the fact that plaintiff had been thrown out of business. *Held*, that the submission did not authorize any allowance for the loss of business plaintiff might have sustained from being deprived of the opportunity to occupy the store; and that, as the void part of the award could not be separated from that which was within the jurisdiction of the arbitrators, the whole was void. *Id.*

BANKS AND BANKING.

1. The title to commercial paper received by a bank for collection and forwarded to its correspondent bank in the usual course of business, without any express agreement in reference thereto, does not vest in such correspondent, even if it has remitted on general account in anticipation of collections. *Nat. Park Bk. v. Seaboard Bk.* 28
2. When a raised draft so forwarded is presented by the correspondent bank, as agent, and the drawee, through mistake, pays it, the collecting bank cannot be required to repay, if it has paid over to its principal before notice of the mistake. *Id.*
3. When payment is made upon general account without direction as to its application the law applies it to the oldest items. *Id.*
4. A draft for \$8 drawn on the plaintiff, which had been raised to \$1,800, was delivered to the Eldred Bank for collection; that bank indorsed it "for collection for account of the Eldred Bank," and forwarded it to defendant, its correspondent bank. The latter, on receipt, credited the amount of the draft as raised to the Eldred Bank, presented it on July 16, 1885, and plaintiff, through a mistake of fact, paid it. All the banks acted in

good faith; the alteration was not discovered until August 15. By the established course of business between defendant and the Eldred Bank the former did not become responsible for any draft so forwarded for collection, but was reimbursed by the latter in case of non-payment if it had made any credits, payments or remittances in anticipation of collection. At the time of the discovery the aggregate of the debits in defendant's account with the Eldred Bank exceeded the aggregate of credits by more than the \$1,800, but said balance arose wholly from transactions subsequent to the date when said draft was paid and the entire amount to the credit of the Eldred Bank when the draft was paid, including its proceeds, had been drawn out before the alteration was discovered. In an action to recover the amount so paid, less the face of the draft as drawn, the trial court found that the sum paid by plaintiff had, prior to August fifteenth, been paid over by defendant to the Eldred Bank; and that defendant never had any title to or interest in the draft. Held, that the said findings of fact were justified by the evidence and were conclusive here; and that the complaint was properly dismissed. *Id.*

5. A draft drawn upon defendant was indorsed by the payee and mailed to the indorser; it never reached him, but fell into the hands of some person who presented and procured it to be certified by defendant; a memorandum showing the number and amount of the draft and that it was certified was entered upon a register kept by defendant of bills drawn upon *it* by the drawer of this one. The drawer notified defendant by letter of the miscarriage of the draft and not to pay it. Thereupon there was added to the memorandum the words, "stop pay't; see letter." Subsequently the draft, which had been altered by raising the amount and changing the date and name of payee, was offered to plaintiffs in payment for certain bonds. In an action to recover the amount of the draft as raised, aside from proof of these facts, plaintiffs' evidence was

to the effect that they sent the draft to defendant's banking-house by a messenger, who presented it at the window of the paying-teller stating that plaintiffs wished to know whether the certification was good. The person in attendance, without referring to the register, answered "yes." Upon being advised of this plaintiffs received the draft in payment for the bonds. In an action to recover the amount of the draft as raised, held, that the evidence was sufficient to justify a finding of negligence on the part of defendant in failing to disclose the facts to plaintiffs' messenger and to authorize a recovery. (*Clara v. Bk. of N. Y. N. Bkg. Assn.* 70

6. Also, held, that a refusal of the court to charge that the teller was not the agent of the bank for the purpose of giving information, other than as to genuineness of signature of drawer and acceptor, was not error. *Id.*

7. One of the plaintiffs, as a witness, was asked on cross-examination: "What do you understand to be the contract of certification of a check or draft?" This was objected to and excluded. Held, no error. *Id.*

8. This action was brought by plaintiff, as receiver of an insolvent state bank, to recover the amount of certain bills of exchange alleged to have been transferred by the bank to defendant in violation of the provisions of the act of 1882 (§§ 186, 187, chap. 409, Laws of 1882), which prohibits a conveyance, assignment or transfer by a bank, not authorized by a previous resolution of its board of directors, of property exceeding in value \$1,000, except in the transaction of its ordinary business (§ 186), and also prohibits giving a preference to creditors in case of insolvency and requires the creditor so given a preference to account for the money or property received to the bank's creditors or stockholders or their trustees. The following facts appeared: On December 16, 1882, the said bank was, to the knowledge of its president and cashier, insolvent. It

continued business, paying all demands until the close of business on December nineteenth, when it stopped payment. At a meeting of its directors held that evening, at which its cashier was present, it was resolved that proceedings be commenced for the appointment of a receiver. On December sixteenth the bank discounted for defendant promissory notes and gave it credit for the avails, and on December eighteenth and nineteenth it received cash deposits. At the close of business December nineteenth there was a balance of \$3,004.22 to defendant's credit. On December twentieth, about an hour before the usual time of opening the bank for business, defendant's secretary went to the bank at the request of its cashier and received from him six bills of exchange aggregating \$3,180.32, the largest being \$88.68, giving defendant's check for the amount, dated December nineteenth; the cashier entered the transaction in the books of the bank under that date. The apparent overdraft of \$79.81 defendant paid at the request of plaintiff, who was then ignorant of the above facts. Having learned of them he made demand for the full amount of the bills. *Held*, that, as the aggregate amount of the bills transferred exceeded in value \$1,000, the transfer was prohibited, notwithstanding no one of them was of that value; that, as defendant was not a purchaser for value and the transaction was not in the usual course of business, it was illegal without regard to defendant's intent or whether it knew the bank was insolvent; also, that, although the reception of the deposits from defendant was a fraud, and as between it and the bank the latter acquired no title to them, and they might have been recovered from the bank or its receiver if they could have been identified or their avails traced, yet the transaction in question was not a restoration or restitution by the wrong-doer, but was a compensation for the fraud, which, in the case of an insolvent bank, is prohibited by statute; that the fact defendant became a creditor

through the fraud of the bank officers, and, so, the bank was a trustee, *ex malicio*, gave defendant no right to a preference over other creditors; and that the transaction between defendant and the receiver was not a settlement between the parties. *Atkinson v. Roch. Printing Co.* 168

9. A sale made by a duly appointed receiver of a state bank, pursuant to and upon terms expressed in an order of the Supreme Court, of a judgment, part of the assets of the bank, is a judicial sale, and the court may compel, by order, a specific performance of the contract of sale. *In re Denison.* 621
10. A confirmation of the contract of sale is not a requisite to its consummation, and it is not material whether the sale was public or private. *Id.*

BANKRUPTCY.

This action was brought to recover for goods sold. At the time of its commencement proceedings in bankruptcy were pending against the defendants. An order of arrest was issued in the action on the ground of false representations inducing the sale. After an injunction had been obtained in the bankruptcy court to restrain proceedings to collect the debt one of the defendants was arrested under the order. Thereupon defendants instituted proceedings to punish plaintiffs, their attorneys, etc., for contempt. Pending these proceedings plaintiffs signed a stipulation whereby they agreed that the order of arrest should be vacated, and that no additional or further arrests should be made in the action, "or any action to collect the debt, except in bankruptcy, on their part, in respect to or upon the claim or debt, for the recovery of which the action" was brought, and that either party might enter an order *ex parte* to that effect. The defendants having been adjudicated bankrupts, set up their discharge in bar. Plaintiffs, on the trial, offered evidence tending to prove

that the debt in suit was fraudulently contracted. Defendants objected, producing the stipulation in support of their objection, and claiming that under it plaintiff's proceedings were limited to the bankruptcy court, and they could proceed to judgment in the action only in case the discharge was refused. The objection was sustained. *Held*, error; that the stipulation did not deprive plaintiffs of the right to prove that their debt was not one of those from which defendants were relieved by their discharge. *Schroeder v. Frey*. 266

BILLS, NOTES AND CHECKS.

1. The title to commercial paper received by a bank for collection and forwarded to its correspondent bank in the usual course of business, without any express agreement in reference thereto, does not vest in such correspondent, even if it has remitted on general account in anticipation of collections. *Nat. Park Bk. v. Seaboard Bank*. 28
2. When a raised draft so forwarded is presented by the correspondent bank, as agent, and the drawee, through mistake, pays it, the collecting bank cannot be required to repay, if it has paid over to its principal before notice of the mistake. *Id.*
3. A draft drawn upon defendant was indorsed by the payee and mailed to the indorser; it never reached him, but fell into the hands of same person who presented and procured it to be certified by defendant; a memorandum showing the number and amount of the draft and that it was certified was entered upon a register kept by defendant of bills drawn upon it by the drawer of this one. The drawer notified defendant by letter of the miscarriage of the draft and not to pay it. Thereupon there was added to the memorandum the words, "stop pay't; see letter." Subsequently the draft, which had been altered by raising the amount and changing the date and name of payee, was offered to plaintiffs in payment for certain bonds. In an action to recover the amount of the draft as raised, aside from proof of these facts, plaintiffs' evidence was to the effect that they sent the draft to defendant's banking-house by a messenger, who presented it at the window of the paying-teller stating that plaintiffs wished to know whether the certification was good. The person in attendance, without referring to the register, answered "yes." Upon being advised of this plaintiffs received the draft in payment for the bonds. In an action to recover the amount of the draft as raised, *held*, that the evidence was sufficient to justify a finding of negligence on the part of defendant in failing to disclose the facts to plaintiffs' messenger and to authorize a recovery. *Cleves v. Bk. of N. Y. Assn.* 70
4. A draft was drawn upon defendant for \$900, payable at a time specified, with direction to charge the same against the drawer "and of" his mother's estate. Following the name of defendant in the draft was the word "executor." He accepted it, adding to his name the same word. In an action upon the acceptance it appeared that defendant was executor of the will of R. who was the mother of the drawer of the draft. The draft was indorsed over by the payee to his wife, the plaintiff. There was evidence tending to show that the draft was taken by the payee for plaintiff or with a view to transfer it to her. Defendant offered to show that when the draft was drawn it was understood between the drawer, payee and plaintiff that it was to be paid out of the drawer's interest in the estate; that defendant then stated in their presence he would not accept or become liable personally, and it was agreed that he should accept in his capacity as executor, to be paid only out of the drawer's interest in the estate. This evidence was objected to and excluded. *Held*, error; that the testimony was competent as bearing upon the understanding of the relation and the character of the

Liability defendant assumed by his acceptance. *Schmittler v. Simon.*

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5. Where it is made to appear that a check, indorsed over by the payee, was altered after his indorsement without his consent, the presumption is that it was so made as to vitiate it, as against, the indorser, and the burden is upon the party seeking to enforce it to relieve it from the effect of the unauthorized indorsement by showing that it was made by a stranger to the instrument. *Nat. Ulster Co. Bk. v. Madden.* 280

6. In an action upon a promissory note the answer alleged that the note was procured to be discounted by one F. in pursuance of a corrupt and usurious agreement, whereby he received and charged a greater rate of interest than prescribed by law. Upon the trial defendants failed to show by whom the note was discounted, or that the person so discounting it charged more than the legal rate. They proved, and requested the referee to find, that one who had previously assisted in procuring discounts of paper made and indorsed by the same parties, agreed to discount or procure the note to be discounted for five per cent of its face; that he procured the note to be discounted, and subsequently gave to the indorser, with whom he made the agreement, a check of F. for the face of the note, less five per cent, as the proceeds of the note. It appeared that F. did not discount the note. These requests were refused and exceptions taken. *Held*, that the refusal to find did not constitute error justifying a reversal of the judgment, as if the referee had found as requested, this would not have justified a determination in favor of defendants; that the burden of proof was upon them to show the usurious exaction by the party discounting the note, and such result was not accomplished by proof of payment of a sum of money exceeding the legal rate of interest to a party undertaking for a consideration to procure the note to be discounted; that if D. acted as agent for the defendant, the plaint-

iff's rights could not be affected by proof of transactions between defendants and their agent; that even if it could be held that in what he did D. was the agent of the parties discounting the note, to establish their defense, it was incumbent upon defendants to show that, as such agent, he took the bonus with the knowledge and consent of his principal. *Baldwin v. Doying.* 453

7. Defendants were copartners doing business as private bankers. All capital was furnished by S., the other members contributing simply their services. S. was advised by his partners that the firm was about to suspend. He had at the time to his credit in a private account with the firm over \$10,000, consisting of deposits made independent of his capital account. S. drew his individual check on his private account which he delivered to plaintiff with directions to pay therewith certain debts of his. All the other partners had knowledge of the check and its purpose, and it was agreed that it should be paid out of the cash items then in hand, and the check was charged to the said individual account. On presentation of the check one of the partners offered to pay the amount in currency, but at plaintiff's request a draft was given instead, drawn by the firm upon a New York bank, which was not paid. In an action upon the draft the defendants, other than S., defended on the ground that plaintiff had no title to the draft, but that S. was, in fact, the owner and that the latter could not in his own name, or in that of another, maintain an action against himself and copartners as makers of the draft. *Held*, untenable; that so far as his deposit account was concerned S. stood in the same position toward the firm, as between the copartners, as that of any other depositor, and could have enforced his right to draw out the fund in an action brought directly against his partners; and that he could transfer this right, and having so done, it was no concern of his partners, and they were not entitled to inquire as to whether the transfer was with or without consideration; also, that, as the

rights of creditors were not involved, the fact that the firm had failed did not affect defendants' liability. *Stethheimer v. Tunc*. 501

BONA FIDE HOLDER.

1. The rule that where one who has purchased real estate, with full notice of an equitable claim of another thereto, transfers it to a *bona fide* purchaser, the latter not only takes a good title, but can transfer such a title to one who purchases with full knowledge of the fact, is subject to this exception, where the transfer is back to the original purchaser, who was guilty of constructive fraud in transferring the property; if it becomes revested in him, the original equity will reattach to it in his hands. *Clark v. McNeal*. 287
2. A purchaser *pendens litem* of the subject of the litigation in an action to compel specific performance by the vendor of a contract for the sale of land if he buys in good faith, and without actual notice of the claims of the litigants, is not affected by the suit pending, unless it has been prosecuted with due diligence. *Hayes v. Nourse*. 595

— *When town may not maintain an action against a bona fide holder for cancellation of its bonds issued under town bonding act.*

See Town of Solon v. W. S. Et al. 122

BOND.

1. An action at law cannot be maintained against the sureties upon the bond of a general guardian until proceedings for an accounting have been had against the guardian and his default established therein. *Perkins v. Stimmel*. 859
2. The fact of the death of the guardian does not take the case out of the rule, as his personal representatives may be required to account (Code of Civil Pro. § 2806, as amended by Chap. 899, Laws

of 1884), and before the sureties can be sued the proceedings on the accounting must at least establish the fact that none of the infant's property has come into the hands of the personal representatives. *Id.*

*See TOWN BONDING.
UNDERTAKING.*

BROOKLYN (CITY OF).

1. Taxes assessed for the years 1882, 1883, 1884 and 1885 upon certain lots in the city of Brooklyn owned by the relator, being in arrears, he called at the office of the registrar of arrears and asked the clerk charged with that duty to give him all the bills for taxes, etc., against his property, stating that he wished to settle up. He was given the bills for the taxes for 1882, 1883 and 1884, which he paid, but no bill for 1885 was given to him. The registrar subsequently sold the lots for the unpaid taxes of 1885. The relator, as soon as he learned of this, tendered to the registrar the amount of such unpaid tax, which was refused. *Held*, that under the charter of the city (§ 16, tit. 8, chap. 863, Laws of 1873), it was the duty of the registrar upon the request of the relator to furnish him with a correct statement of all unpaid taxes upon his lots; that the sale was void and the relator was entitled to a *mandamus* to compel the registrar to accept the tax and cancel the sale; also, that as the purchaser had not received a conveyance he was not a necessary party. *People ex rel. v. Registrar of Arrears, Brooklyn*. 19
2. The provision of the charter of the city of Brooklyn (§ 9, tit. 10, chap. 863, Laws of 1873) which declares that the assessment-roll "shall be duly sworn to by at least two of the assessors * * * to the effect that they have together personally examined within the year past each and every lot or parcel of land," etc., does not require that all of the verifying assessors should depose that they together examined the property;

- it is sufficient if at least two of them swear that they did so examine. *Kane v. City of B'klyn.* 586
3. Where, therefore, a roll was verified by all of the assessors, each severally deposing that at least two of them "have together personally examined," etc., *held*, that this was a sufficient compliance with the statute; that it was not necessary to identify the two who made the examination. *Id.*
4. The provision of the act of 1878, relative to the collection of taxes and assessments in the city of Brooklyn (Chap. 846, Laws of 1878), which requires that "the annual taxes shall be confirmed by the common council, the tax-roll signed by the board of supervisors, and the books delivered to the collector of taxes on or before the fifteenth day of November," was not designed to change the method of assessing the annual taxes, but to fix the time within which all the requisite steps shall be taken, and the reference to the signing of the roll by the board of supervisors is simply to the signing of the warrant annexed to the roll as prescribed by the Revised Statutes. (1 R. S. 896, § 87.) *Id.*
5. Where, therefore, it appeared that a roll was signed by a majority of the then board of supervisors, and was duly approved and confirmed by resolution of the board, *held*, that this met the requirements of the statutes. *Id.*
6. It is not essential to the validity of a return, made by the registrar of arrears, of taxes levied in the previous year remaining unpaid, that it shall be authenticated by a written certificate signed by the collector. *Id.*
7. A mistake in the printed list, prepared by the registrar, in the name of the street on which the property to be sold is situated does not affect the validity of the sale; it is sufficient if the ward, block and lot numbers be stated. (Chap. 405, Laws of 1885.) *Id.*
8. The notice of sale, in pursuance of which plaintiff's property was sold, was dated and first published on March fifteenth; the day of sale specified was April fourteenth. *Held*, that this was a compliance with the statutory provision (§ 1, chap. 405, Laws of 1885) requiring the sale to be at a time "not less than thirty days after the first publication." *Id.*

BURDEN OF PROOF.

1. In an action brought by the dairy commissioner in the name of the People to recover the penalty imposed by the act of 1885 "to prevent deception in the sale of dairy products" (Chap. 183, Laws of 1885), for a violation of one of the provisions of the act (§ 7), which by the terms of the act (§ 21), does not apply "to any product manufactured or in process of manufacture at the time of the passage of this act;" it is not necessary for plaintiff to prove that the product in question was manufactured after the passage of the act; the burden is upon the defendant seeking the benefit of the exception to bring his case within it. *People v. Briggs.* 56
2. Where it is made to appear that a check, indorsed over by the payee, was altered after his indorsement without his consent, the presumption is that it was so made as to vitiate it, as against the indorser, and the burden is upon the party seeking to enforce it to relieve it from the effect of the unauthorized indorsement by showing that it was made by a stranger to the instrument. *Nat. Ulster Co. Bank v. Madden.* 280
3. In an action upon a promissory note the answer alleged that the note was procured to be discounted by one F. in pursuance of a corrupt and usurious agreement, whereby he received and charged a greater rate of interest than prescribed by law. Upon the trial defendants failed to show by whom the note was discounted, or that the person so discounting it charged more

than the legal rate. They proved, and requested the referee to find, that one who had previously assisted in procuring discounts of paper made and indorsed by the same parties, agreed to discount or procure the note to be discounted for five per cent of its face; that he procured the note to be discounted, and subsequently gave to theendorser, with whom he made the agreement, a check of F. for the face of the note, less five per cent, as the proceeds of the note. It appeared that F. did not discount the note. These requests were refused and exceptions taken. *Held*, that the refusals to find did not constitute error justifying a reversal of the judgment, as if the referee had found as requested, this would not have justified a determination in favor of defendants; that the burden of proof was upon them to show the usurious exaction by the party discounting the note, and such result was not accomplished by proof of payment of a sum of money exceeding the legal rate of interest to a party undertaking for a consideration to procure the note to be discounted; that if D. acted as agent for the defendant, the plaintiffs' rights could not be affected by proof of transactions between defendants and their agent; that even if it could be held that in what he did D. was the agent of the parties discounting the note, to establish their defense it was incumbent upon defendants to show that, as such agent, he took the bonus with the knowledge and consent of his principal. *Baldwin v. Doying.* 458

4. To make a payment to one, not the legal owner, effectual, the duty devolves upon the payor of showing that the person to whom payment was made had, at the time, a right to receive payment. *Seymour v. Smith.* 481

CANALS.

Prior to 1838 a dam was built across the outlet of Owasco lake, which was used for hydraulic purposes by the proprietors. In 1857 an act was passed (Chap. 527, Laws of

1857) appropriating the dam for the use of the Erie canal, subject, however, to the use for hydraulic purposes by the owners of such dam at the time of such appropriation. The canal commissioners were authorized to increase the height of the dam, and to appropriate for the purpose the necessary lands, water rights, etc. In pursuance of a resolution of the canal board, flush gates were put upon the dam by the commissioner in charge, raising the water in the lake. In 1878 plaintiff presented a claim against the state for permanent damages to his adjoining lands, and an award was made to him therefor. Under an act of 1874 (Chap. 399, Laws of 1874), the dam was rebuilt of the same height as the old one, with flush gates two feet in height taken from the old dam and built into the new. In 1881 defendant, who was a director and the superintendent of a corporation, one of the proprietors of the dam at the time of its appropriation in 1857, acting under an authority in writing of the assistant superintendent of public works, given to him two years before, opened the gates of the dam and the water overflowed said lands of the plaintiff. Said assistant reported promptly to the superintendent the authority so given, and he had allowed it to remain in force. In an action to recover damages, *held*, that, assuming that the commissioners did not proceed in all things as required by statute, yet the legislature, in subsequently making appropriations and passing laws upon the subject, must be deemed to have acted with reference to what had been done by the canal authorities, and to have adopted and ratified their acts; and that, therefore, at the time in question, the state had the right to use the flush gates, and the remedy, if any, of any person whose property was injured by such act was by claim for compensation from the state; that the appointment of defendant to take charge of the gates must be deemed to have been ratified by the superintendent; also that defendant was not ineligible under the provision of the Revised Statutes (1 R. S. 250, § 185), which

declares that no person owning any hydraulic works "dependent on the canals for their supply, or employed in or connected with such works, shall be employed as an agent upon the canals," as the said corporation was not dependent upon the canals, its right to the use of the water having been reserved by the act of 1857 (*supra*); that the subsequent action of the state must be presumed to have been subject to the original rights reserved; and that, therefore, the action was not maintainable. *Shaver v. Eldred.* 238

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In re Otis (101 N. Y. 580), distinguished. *Otis et al. v. Conway.* 16

Bullymore v. Cooper (46 N. Y. 236), distinguished. *Shaffer v. Risley.* 27

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Pinney v. Johnson (8 Wend. 500), distinguished. *Schmittler v. Simon.* 188

Smith v. Clews (105 N. Y. 283), distinguished. *Smith v. Clews.* 193

Sargent v. E. B. A. Co. (11 N. Y. State Rep. 618), distinguished. *Warren v. Wilder.* 215

Chamberlain v. Taylor (92 N. Y. 348), distinguished. *Pearce v. Moore.* 259

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CAUSE OF ACTION.

1. Plaintiff's complaint alleged, in substance, that he was the holder of a chattel mortgage covering a portion of the furniture and fixtures of a hotel; that defendant H. was the holder of two junior mortgages covering portions of said property, and some not covered by plaintiff's mortgage; that defendant W. held another mortgage covering all of said property; that the sheriff, by virtue of a judgment and execution in favor of defendant L. against the person holding the property and carrying on the hotel, had levied upon said property and was proceeding to sell the same; that W., L. and the sheriff claimed their liens were prior to that of plaintiff's mortgage because of his omission to renew it by re-filing; that the property, if sold in bulk, would produce enough to pay all the liens, but would bring much less if sold separately with the conflicting claims thereon. The complaint asked for the appointment of a receiver, with authority to sell the property in bulk and distribute the proceeds under the direction of the court and in accordance with the rights and priorities of the parties. Held, that the complaint set forth various subjects of equitable jurisdiction, i. e., the foreclosure of chattel mortgages, the determination between creditors of the extent and priority of conflicting liens, the advantages to creditors of a sale in bulk instead of in separate parcels, each of which was sufficient to maintain an action in equity, and their combination in one complaint would not defeat the action; also, that, in the absence of a demurrer or answer presenting the question

- that plaintiff had a remedy at law, that objection could not be raised. *Ostrander v. Weber.* 95
2. Plaintiffs executed to one F. a bill of sale of certain goods, absolute in form, but which was intended merely as security; the goods remained in plaintiffs' possession. Subsequently F., at the request of plaintiffs, transferred the goods by bill of sale to defendant. This was done under an arrangement that defendant should take possession of the goods and with the consent and approval of plaintiffs, and not otherwise, sell them and distribute the proceeds among plaintiffs' creditors as directed; the assignment being made to avoid trouble with creditors. Defendant sold the goods without such consent and retained the proceeds. In an action for conversion, *held*, that the transfer by F. was simply a formal waiver of his security and left plaintiffs at liberty to dispose of the property; and that, as under the agreement with defendant, the latter had no power to complete the sale or deliver the property until he had obtained plaintiffs' approval as to price, the unauthorized sale was a conversion; and so, the action was maintainable. *Comley v. Dazian.* 161
8. Where a broker, who was one of the parties to an unlawful scheme to advance the price of lard, but who acted in carrying out the scheme simply as agent for the others, was proved to have defrauded his principals, *held*, that an action to compel him to account was not maintainable; that the courts would not aid in adjusting differences arising out of and requiring an investigation of the illegal transactions. *Leonard v. Poole.* 871
- in July, 1886, one McC. held the position of second assistant chief of the department; that the board of fire commissioners adopted a resolution discharging him for incompetency and incapacity; and thereafter, on August 4, 1886, in good faith, believing said position to be vacant, by resolution promoted one R. to it from that of chief of battalion, and promoted the relator to the latter position from that of foreman. This resolution did not state that the promotion was made to fill a vacancy. Subsequently, on *certiorari*, the proceedings of the board in the removal of McC. were adjudged void and he was reinstated, and the persons so promoted were transferred back to their former positions. *Held*, that the return of the board must be taken as true; that its resolution promoting the relator must be construed in connection with the facts appearing, and when so construed, it appeared that no new office was created or intended thereby, but that the relator's promotion was to fill a supposed vacancy which did not, in fact, exist; that the proceedings of the board were not in conflict with the provisions of section 440 of the New York Consolidation act (§ 440, Chap. 410, Laws of 1882), and were regular and proper. *People ex rel. v. Fire Comrs., N. Y.* 67
2. As a general rule no claim against a town is obligatory upon or enforceable against it until it has been audited and allowed by said board. Its jurisdiction over such claim is not only original, but its decision is conclusive until reversed or modified by another court in the manner prescribed by law, i. e., in proceedings by *certiorari*. *People ex rel. v. Barnes.* 317
- CERTIORARI.**
1. On *certiorari* to review the action of the Board of Fire Commissioners of the city of New York in transferring the relator from duty as chief of battalion in the fire department to that of foreman, it appeared from the return of the board that
- CHATTTEL MORTGAGE.
1. When a mortgagee, holding a mortgage upon several chattels, continues to sell after he has realized sufficient to pay the debt and costs, he becomes a trespasser. *O'Rourke v. Hadcock.* 541

2. Where there is an agreement or understanding between the parties at the time of the execution of a chattel mortgage that the mortgagor may sell or dispose of the mortgaged property or any portion thereof for his own use, the mortgage is void as to the creditors of the mortgagor. *Hangen v. Hache-meister.* 568
and that with this finding the mortgage was void as against creditors; that the administrator represented the creditors as well as the estate, and as such had the right to disaffirm the mortgage. *Id.*
3. The agreement or understanding may be proved by parol or may be inferred from the fact that the mortgagee permits the sale to be made. *Id.*
4. In 1887 one V. R., who was engaged in keeping a saloon in the city of New York, died. The public administrator was appointed administrator of his estate, and as such took possession of and sold the furniture, fixtures, etc., of the saloon to plaintiff, who thereupon took possession and continued the business with the property so purchased. Defendant entered the premises and took away the property so purchased, claiming title thereto under a chattel mortgage executed by the deceased in 1876. The mortgage, by its terms, covered all the goods and chattels in the saloon belonging to the mortgagor, mentioned in a schedule annexed. The schedule enumerated all the furniture and fixtures in the saloon and the stock of wines, ales, liquors and cigars. The mortgage provided that until default in payment the mortgagor was to remain in quiet and peaceable possession of the goods and chattels and the full and free enjoyment of the same. In an action for the alleged conversion of said property there was evidence that the mortgagee had loaned the mortgagor money to carry on the saloon; that the latter continued the business until about the time of his death, conducting it in the usual way; that there were other creditors of the deceased and that he died insolvent. *Held*, that the jury had a right to infer from the facts that it was mutually understood between the parties that the mortgagor should have the right to sell and dispose of the merchandise embraced in the mortgage for and on his own account,
5. It appeared that a controversy arose as to the validity of the mortgage between the public administrator and defendant's attorney, who had been employed to foreclose it and take possession of the property. Evidence was given tending to show that there was an arrangement between them, by which the property was to be sold and the proceeds retained subject to the determination of the question as to the validity of the mortgage. This was objected to as irrelevant and incompetent. The objection was overruled. *Held*, no error. *Id.*
6. Defendant requested the court to charge that plaintiff must prove that the mortgagor actually sold, as his stock in trade, property covered by the mortgage and applied the money to other purposes than the mortgage debt. This was refused. *Held*, no error; that the request was incomplete and, as it stood, meaningless, because it did not point out the consequences which would result if the proof was not made; but *held*, that it was the agreement authorizing the mortgagor to sell that vitiated the mortgage, not the fact that a sale was made. *Id.*

CLAIM AND DELIVERY.

1. Plaintiff contracted to sell to defendant a canal boat and furniture, and four mules with their harnesses, on credit, the purchase-price to be paid in installments. The contract provided that defendant was to have immediate possession, but that title to the boat should not pass until the purchase-price was paid. To secure the payment defendant executed to plaintiff a mortgage upon another canal boat. Subsequently, and after the whole purchase-price became due, plaintiff took possession

of the mules and advertised them for sale, together with the boat sold with its furniture; and on the same day, by separate notice, advertised the other boat for sale under and by virtue of the chattel mortgage, and then brought this action to recover possession of the two boats, their furniture, etc. These were seized by the sheriff and delivered by him to plaintiff, who sold them pursuant to said advertisements. The four mules and their harnesses were worth more than the balance of the purchase-price unpaid to plaintiff. Held, that the action of plaintiff was an election to affirm the contract and collect the amount due upon it and that judgment was properly rendered against the plaintiff for the value of the mules, less the amount unpaid; also, for the value of the use, and damages for the detention of the two boats; also for their value in case a return could not be had. *O'Rourke v. Haddock.* 541

2. It appeared that defendant had commenced an action against plaintiff for an accounting, claiming that the purchase-price had been paid and asking that the notes given for the purchase-price, the chattel mortgage and contract be surrendered, and that defendant be restrained from selling the property described in the contract and mortgage. On trial of said action the referee found that the plaintiff was still indebted to the defendant in the sum of \$126.38 and directed a dismissal of the complaint. Judgment was entered pursuant to the report. Held, that the judgment-roll was conclusive evidence in this action as to the amount unpaid. *Id.*

CODE OF CIVIL PROCEDURE.

§ 46. <i>O'Reilly v. City of Kingston.</i>	439	§ 575. <i>Carr v. Sterling.</i>	558
§ 190. <i>Randall v. Randall.</i>	499	§ 764. <i>Corbett v. Twenty-third St. R. Co.</i>	579
§ 191, sub. 3. { <i>Powers v. City of Yonkers.</i>	145	§ 829. <i>Clark v. McNeal.</i>	288
} <i>Warren v. Wilder.</i>	209	§ 971. <i>Randall v. Randall.</i>	499
§ 499. <i>Perkins v. Stimmel.</i>	359	§§ 990, 1000, 1001. <i>MacNaughton v. Osgood.</i>	574
§ 582. <i>Brownell v. Town of Greenwich.</i>	518	{ <i>N. Y., P. & B. R. R. Co. v. Dixon.</i>	80
		<i>Brownell v. Town of Greenwich.</i>	518
		§ 1847, sub. 2. <i>Randall v. Randall.</i>	499
		§§ 1698, 1686. <i>Weiler v. Nembach.</i>	36
		§ 1931. <i>People ex rel. Myers v. Barnes.</i>	818
		§ 2204. <i>Shaffer v. Riseley.</i>	23
		§ 2606. <i>Perkins v. Stimmel et al.</i>	359

COMMISSION MERCHANT.

See FACTOR.

COMMISSIONERS.

See DAIRY COMMISSIONER.
COMMISSIONERS OF HIGHWAY.
COMMISSIONERS OF LAND OFFICE

COMMISSIONERS OF HIGHWAYS.

- In proceedings by *mandamus*, instituted by a commissioner of highways to compel the board of town auditors to audit certain claims against the town for costs awarded against the relator and paid by him in actions brought by him as such commissioner, and for moneys expended by him in that capacity, it was admitted that the claims had been presented to former boards and rejected by them on the ground that the town was not legally liable to pay them. Held, that the former adjudications were conclusive, and that until reversal they formed a bar to a reauditing of the bills and to the application for a *mandamus* to compel it. *People ex rel. v. Barnes.* 817
- Neither the Revised Statutes (1 R. S., 357, § 8), nor the Code of Civil Procedure (§ 1931), impose

an absolute liability upon towns for all judgments recovered against a sole commissioner of highways in actions prosecuted by him in his official name. *Id.*

3. The board of town auditors have power to examine and determine whether the action was one the commissioner had the right to prosecute in his official character and whether it was carried on in good or bad faith. *Id.*

COMMISSIONERS OF LAND OFFICE.

1. The provision of the Revised Statutes (1 R. S. 208, § 67), prohibiting the commissioners of the land office from making grants of land under the waters of navigable streams "to any person other than the proprietor of the adjacent lands," has reference to proprietors of the adjacent uplands. *Rumsey v. N. Y. & N. E. R. R. Co.* 423
2. A railroad company that has acquired title to land under water some distance from the shore for the purpose of constructing its road-bed, and has built thereon an embankment supporting its tracks, leaving a bay between the embankment and the original shore line into which the tide ebbs and flows, is not a "proprietor of adjacent lands" within the meaning of said provision, and the owner of the upland adjoining the original shore not the railroad corporation, is entitled to the grant. *Id.*
3. It seems the provision of the General Railroad Act of 1850 (§§ 25-49, chap. 140, Laws of 1850), empowering said commissioners to make grants of state lands to railroad corporations, includes a power to grant to such a corporation lands under water for the erection of docks necessary to the transaction of its business. *Id.*
4. It was the intent of the legislature, in the passage of the act of 1846 creating the H. R. R. R. Co., and authorizing the construction of its road along the east shore of the

Hudson river (Chap. 216, Laws of 1846), to protect the upland owners along said shore in their access to the waters of the river, and to maintain their rights in the river unimpaired by the construction of the railroad (§§ 15, 16), and it did not change the policy of the state with reference to the promotion of commerce on the river, or deprive the said commissioners of the power to make grants of land under water to the owner of the uplands. *Id.*

5. Plaintiffs are the owners of certain uplands bordering upon the easterly shore of the Hudson river. In 1848 their predecessors in title deeded to the H. R. R. R. Co. a strip of land, partly above high-water mark and partly under the water of the river, retaining, however, a large part of the original shore line. Upon said strip the railroad company constructed an embankment several feet above high-water mark for their road-bed, which embankment is between plaintiffs' uplands and the channel of the river, but a considerable distance outside of the original shore line. A culvert or opening was built in the embankment, through which the waters flowed into the bay, between it and the said shore line. In 1868 said company obtained from the commissioners of the land office a grant of the land under water covered by its roadway, and extending westward into the river 200 feet. In 1885 said commissioners executed to plaintiffs a grant of land under water extending along the whole water front of their uplands, and westward into the river a considerable distance beyond the said company's road, the grant expressly excepting and reserving the rights of said company. In 1881 defendant built a portion of its road in the waters of the river, in front of plaintiffs' uplands, west of the H. R. R. R. Co.'s road; partly on the land so granted to said company and partly outside, but within the lines of plaintiffs' grant. Held, that the grant to the plaintiffs was valid, and that an action was maintainable to restrain defendant from operating its road over and upon the lands so granted. *Id.*

COMMON CARRIERS.

See RAILROAD CORPORATIONS.

CONSPIRACY.

1. Where a number of persons and firms have conspired together, in violation of the statutes (2 R. S. 692, § 8, sub. 6; Penal Code, § 168), to do acts injurious to trade, for instance, to unlawfully advance the price of an article of food, the court will not intervene in favor of any one of the parties to give him redress for frauds perpetrated by another to his detriment in carrying out the unlawful enterprise. *Leonard v. Poole.* 871

2. It does not affect the question that the party complained of as guilty of the fraud was acting as agent for the others. All those who knowingly promote and participate in carrying out a criminal scheme are principals, and the fact that one acts, in some respects, in subordination to the others, does not render him less a principal. *Id.*

3. Where, therefore, a broker, who was one of the parties to an unlawful scheme to advance the price of lard, but who acted in carrying out the scheme simply as agent for the others, was proved to have defrauded his principals, *held*, that an action to compel him to account was not maintainable; that the courts would not aid in adjusting differences arising out of and requiring an investigation of the illegal transactions. *Id.*

CONTRACT.

1. One H. entered into a contract with defendant to furnish the latter all the boxes of a character specified it might require for one year from January first, at prices named; in case of failure it was provided that defendant might purchase the boxes it required in open market without notice, and charge H. with the excess over the contract-prices. On September 8,

1885, H. made a general assignment to plaintiff for the benefit of creditors; he claimed the right and continued to supply the boxes required until October fifth, when he informed defendant that he would be unable to fill further orders until an arrangement should be made of his affairs. Defendant thereupon contracted with another party to furnish the boxes required at prices in excess of those under the contract with H. Afterwards, at plaintiff's request, defendant permitted him to deliver such further boxes as should be made from lumber already cut for the purpose. In an action to recover for the boxes delivered subsequent to the assignment defendant set up, and was allowed, as a counter-claim, damages for non-performance of the H. contract. *Held*, no error; that while plaintiff had no power, as assignee, to proceed in the performance of the contract without the consent of those beneficially interested in the trust or the direction of the court, having adopted and proceeded to perform it, defendant's damages were available to him as a counter-claim. *Patton v. Royal B. P. Co.* 1

2. Usage in relation to matters embraced in a contract when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, and not in contradiction of the express terms of the contract, and when it is so far established and known to the parties that it may be supposed the contract was made in reference thereto, is deemed to form part of it; and evidence is always admissible to explain the meaning usage has given to words or terms as used in a particular trade or business to enable the court to declare what the contract expressed to the parties. *Newhall v. Appleton.* 140

3. Defendants employed plaintiff to obtain subscriptions for an encyclopedia and other publications issued in numbers, agreeing to pay him "fifteen dollars an order for each and every order" obtained for the encyclopedia and four dollars an order for the other publications. In an action upon the contract

defendants offered to prove that in the subscription book business the words used had a definite and well established meaning; that the words "fifteen dollars an order for each and every order for the encyclopedia" were well understood to mean every order under which five volumes have been taken and paid for by the subscriber, and that four dollars an order for the other publications meant an order upon which ten parts or numbers of the publication had been taken and paid for. This was objected to and excluded. *Held*, error. *Id.*

4. Defendant V. entered into a contract with the city of Y. for improving one of its streets; the contract made it the duty of the city engineer to report to the common council in case the contractor should refuse or neglect to supply a sufficiency of skilled workmen or proper materials, or should fail in any respect to prosecute the work with promptness and diligence, or omit to fulfill any provision of the contract, and the common council were authorized, if satisfied of the correctness of such a report, to declare the contract forfeited, to employ other persons to finish the work "according to the plans and specifications," and to deduct the expenses from any sum due the contractor. While the contractor was engaged in performance the engineer reported that the time for the completion of the contract had "long since expired" and that the contractor had neglected to perform it in other respects. Pursuant to resolution of the common council notice was given the contractor that unless the work was prosecuted with diligence and promptness the city would consider the contract violated and forfeited, and that other persons would be employed to finish the work and the expense charged against the contractor; and, thereafter, that body adopted a resolution that the contract was broken and forfeited and the work was completed by the city. Some of the work done by the contractor, which was imperfect, was taken down and rebuilt. No notice had been given

by the city to the contractor to take down and rebuild or otherwise change any of the work he had done. In an action to foreclose a mechanic's lien upon the moneys unpaid the city claimed to set-off the amount expended in completing the contract. The trial court excluded evidence of the cost of taking down and rebuilding the imperfect work, holding that the city having declared the contract forfeited on one ground could not thereafter allege other grounds, and that it was not authorized to take down and rebuild any work until the engineer had made a report that the contractor had neglected or refused to take down and properly replace such work. *Held*, error; that the forfeiture contemplated by the contract applied only to the contractor; and that upon forfeiture the city had the right to go on and complete the contract, not simply remedying the defects pointed out in the report, but in all other respects wherein the work was not completed according to the terms of the contract; that it was not requisite to specify in the resolution all the grounds of forfeiture, but it was sufficient to specify one tenable ground. *Powers v. City of Yonkers*. 145

5. Plaintiffs, who were diamond merchants, delivered to one M., a diamond broker, a pair of diamond ear-knobs, taking from him a receipt as follows: "Received from Alfred H. Smith & Co. * * * a pair of single stone diamond ear-knobs * * * on approval to show to my customers. Said knobs to be returned to said A. H. Smith & Co. on demand." M. sold the diamonds to defendant C. In an action to recover their possession plaintiff offered to show that the words "on approval" had a recognized meaning in the diamond trade well-known to M.; that they were understood not to confer a power of sale, but authority merely to show diamonds to a customer and report to the owner. This evidence was excluded. *Held*, error; that the receipt upon its face did not import authority to sell; that with the words "on approval" stricken out it would be a complete contract,

giving M. simply authority "to show" and binding him "to return on demand;" that those words, as ordinarily interpreted, were neither inconsistent with the authority or the obligation; and as it was to be presumed they had some meaning to the parties, and as this meaning did not appear from the contract, oral evidence was competent to show the intent of the parties.
Smith v. Clews. 190

6. Also, *held*, that C.'s title to the diamonds depended wholly on M.'s authority to sell, and he was bound by such limitation as the owner had placed upon M.'s possession, and unless authority to sell existed, C., although acting in entire good faith, obtained no title; hence it was of no consequence whether or not C. knew of the custom of the trade.
Id.

7. In 1855 H. contracted to sell certain premises to defendant, who covenanted to pay the purchase-price in annual installments; the deed to be delivered when the whole was paid. It was provided in the contract that in case of non-performance on the part of defendant of any of his covenants the contract should become void and H. have the right to enter into possession, "the same as if the contract had never been signed." Defendant entered into possession and occupied it until March, 1863, paying none of the principal, but paying the interest under an oral agreement. He then transferred his interest in the contract to J., who continued to occupy, under a similar verbal agreement, until his death in 1870. He left surviving him his widow and three children, all infants, who had no estate except their interest in the contract. The widow occupied under a similar verbal arrangement, paying interest up to February 1, 1875, but none of the principal. Before that time one of the children died a minor and intestate. Since that time no interest has been paid. Prior to February, 1877, the widow advised H. that she was unable to pay and asked him to abandon the contract, to which he consented. She had arranged with

plaintiff that he would pay her \$389.50, and pay H. the amount unpaid on the contract if the latter would deed to him; this H. agreed to do. Thereupon the widow, acting on behalf of herself and her children, assigned the contract to plaintiff, agreeing to surrender possession April 1, 1877. In pursuance of this arrangement the contract was surrendered to H., who deeded the premises to plaintiff, the latter paying to the widow the sum agreed. In 1876 defendant rented part of the premises of the widow, and in April of that year was appointed general guardian of the children. After the widow left the premises he occupied the whole premises under a claim of right as guardian, and refused, on demand by plaintiff, to deliver up possession. He tendered to plaintiff a sum greater than the contract price and interest unpaid, but conditioned upon the latter's executing a deed to the children. In an action of ejectment, *held*, that on the death of J. the obligation to pay devolved upon his widow and heirs, and upon demand made of either of them and refusal to pay, plaintiff was entitled to recover possession; that neither the infancy nor widowhood released or modified the obligation or extended the time of payment; that, conceding the right to a specific performance had not wholly ceased to exist, but remained suspended and could have been revived by a tender, that made was insufficient, because coupled with a condition that plaintiff would convey absolutely, although he had acquired and was entitled to retain the widow's interest.
Cornell v. Hayden. 271

8. Defendant and one Q. entered into a written contract, which provided that the latter should build, upon certain lands belonging to the former, a dock and erect thereon a pocket for holding and storing coal. Defendant was to have the use of the south side of the dock and of thirty feet of the shore end and the right to use the other portions when not required by Q. In consideration thereof defendant agreed to transport in its cars all

the coal in car loads offered for transportation by Q. for the term of ten years at a rebate of fifteen cents per ton from the regular tariff rates, Q. to load the coal, and it was understood he was to ship large quantities. At the termination of the contract the dock and structures were to be appraised and the value thereof, less \$2,000 advanced by defendant, paid to Q. The dock and coal-pocket were constructed, pursuant to this agreement, at an expense of \$17,000, and coal in large quantities shipped over defendant's road by Q. or his assignee, under the contract. In an action to recover the rebate agreed upon, defendant claimed that the contract was against public policy and, therefore, illegal and void. There were no findings or request to find, as matter of fact, that there was any unjust discrimination. Held, that this could not be found, as matter of law, and in the absence of such a finding the action was not maintainable. *Root v. L. I. R. R. Co.* 300

9. In an action to recover unliquidated damages for breach of contract, unless the means are accessible to the party sought to be charged of ascertaining, by computation or otherwise, the amount to which plaintiff is entitled, he may not be allowed interest on the amount of damages found, and the submission of the question as to such allowance to the jury is error. *Mansfield v. N. Y. C. & H. R. R. Co.* 381

10. The question whether interest is recoverable in actions on contract does not rest in the discretion of a jury, but is one of law for the court. *Id.*

11. G. & M. contracted to construct for defendant the superstructure of an elevator, they to commence work within five days after notice from defendant's engineer that the foundations were ready, and to complete the structure within five months thereafter. Defendant agreed to pay, in addition to the contract-price, \$500 for each day less than the time allowed occupied in the work; said engineer served

the required notice, but at the time the foundations were not ready. In an action upon the contract plaintiff claimed, and the jury found, that had the foundations been completed and he not delayed by their unfinished condition, he would have completed the work thirty days before the end of the five months, for which he was allowed \$500 per day; he also claimed, and was allowed, damages for the inconvenience and extra work caused by the unfinished condition of the foundations. The court submitted to the jury the question and they allowed interest on the damages found. Held (POTTER, J., dissenting), error; that plaintiff was not entitled to interest on either item of damages. *Id.*

12. But held, that the provision as to the *per diem* allowance was a valid agreement based upon a good consideration; and as the contractors, without fault on their part, were denied the right to perform, they were entitled to the benefits which would have resulted from performance, and so were entitled to the allowance for the thirty days. *Id.*

13. An agreement of parties to an action to limit judicial inquiry, when not unreasonable or against good morals or public policy, is binding upon the courts. *H. K. & S. B. Corp. v. Cooper.* 388

14. In September, 1883, defendant, who was the agent in New York of the firm of M., D. & Co., of Manilla, sold 4,000 bales of hemp, "to arrive," at a specified price, payable on arrival of the hemp at New York from Manilla. The contract of sale was made by defendant in his own name, but was intended to be on account of his principals, whom he immediately notified thereof. In October of that year M., D. & Co. shipped from Manilla, by the Polynesian, 4,000 bales of hemp, deliverable to their order in New York, intending the hemp to be used in fulfillment of said contract; they indorsed, in blank, the bills of lading therefor, which were made out to M., D. & Co., or

order or assigns, and delivered them to plaintiff to secure the payment of five bills of exchange drawn by said firm, upon which plaintiff made advances to said firm. These advances were made, without any knowledge on the part of plaintiff of said sale, by defendant. In December defendant received notice from M., D. & Co. that they had shipped the hemp by the Polynesian. In January, 1884, plaintiff, at the request of the drawees and acceptors of the bills of exchange, forwarded the bills of lading to its agent in New York, "to be delivered to defendant in exchange for his trust receipt." In February the drawers and drawees of the bills of exchange failed. In March plaintiff wrote to defendant inquiring whether the hemp on the Polynesian had been sold "to arrive." Defendant answered that it had, but soon after rescinded his "notice," so-called, that this hemp had been sold, and stating that "the sales of hemp" were made in his name and he should treat them as made for his own account. On arrival of the Polynesian plaintiff, by virtue of the bills of lading, took possession of the hemp; the price had fallen so that it could then be purchased in the New York market at much less than the contract-price. Plaintiff demanded of defendant that he should deliver the hemp under the contracts, paying over to it the proceeds, less commissions and expenses, to the extent of its said advances, which defendant declined to do. Thereupon the parties agreed that defendant should receive the hemp, deliver it on the contracts, deposit a sum agreed upon as "profits," to await the determination of a litigation, pay over to plaintiff the balance, less commissions, etc.; the parties stipulating that should the court decide that defendant "had the right, as against" plaintiff, to deliver on his contracts other hemp purchased by him in these markets judgment should be rendered in his favor for the amount so deposited. The hemp was thereupon received and delivered by defendant upon said contract; the amount paid over to plaintiff was insuffi-

cient to pay its advances. In an action to determine the rights of the parties to the deposit, *held*, that, as against plaintiff, defendant had the right to deliver other hemp than that in question, and so was entitled, under the agreement, to the deposit; that, assuming the contracts of sale, although made in defendant's name, were the acts and property of his principals, plaintiff had no interest in or control over them. *Id.*

15. *It seems* that, had the said contracts provided for a delivery of the hemp to arrive by the Polynesian, a different question would have been presented. *Id.*
16. *It seems* that, prior to the passage of the enabling act of 1884 (Chap. 380, Laws of 1884), a married woman could only contract in cases where authority was expressly conferred by statute. She could bind herself: *First*. Where the obligation was created in or about carrying on her trade or business. *Second*. Where the contract related to or was made for the benefit of her separate estate. *Third*. Where the intention to charge her separate estate was expressed in the instrument or contract by which the liability was created. *Fourth*. Where the debt was created for property purchased by her. The contract could be express or implied and made personally or by agent, and she could authorize her husband to act as such agent, and upon contracts thus made and debts thus created her separate estate would be chargeable. *Dickerson v. Rogers.* 405
17. In an action to recover damages for fraud in the sale or exchange of a lot of marble, the complaint alleged, and plaintiff's evidence tended to show, that he agreed to sell a hotel property for \$5,100 to defendant, who agreed to pay by assuming a mortgage of \$1,000 thereon, paying plaintiff \$1,100 in cash, and transferring to him a lot of marble which defendant represented to have cost him and to be of the market-value of \$3,000. It was further alleged that defendant colluded with one F. to appraise

the marble at a fictitious value, and that F. did so. It was conceded on the trial that the actual cost and value of the marble did not exceed \$1,000. Defendant denied having made false statements as to the cost of the marble, and gave evidence which, if credited, would have justified a finding that both he and F. told plaintiff the marble cost between \$800 and \$1,000, and gave evidence tending to disprove that a fixed price was agreed upon in the exchange for the plaintiff's property. Defendant then offered to prove that at the time of the sale the hotel property was not worth \$5,100, or anything like that sum. This was excluded on plaintiff's objection, and defendant excepted. *Held*, error; that the fact as to the agreement being in dispute, the real value of plaintiff's property was an element for the jury to consider in determining which version was correct. *Weidner v. Phillips*.

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18. Plaintiff, who was an expert in railroad building, at the request of S., who assumed to be defendant's chief engineer, and, under an arrangement between him, S. and two attorneys, who assumed to act as defendant's counsel, to the effect that plaintiff should have the contract for building defendant's road, devoted his time for about nine months and expended moneys for traveling expenses, for plans and specifications and other necessary expenses, preparatory to making the contract and doing the work. Plaintiff made and submitted to one of the attorneys his proposal to construct and equip the road. A proposed contract was drawn up, but plaintiff was informed by one of the attorneys it was deemed advisable to have the contract made by defendant with one D., and by the latter assigned to plaintiff, to which the latter assented. Up to this time S. and the attorneys had not been formally employed by defendant, although their names appeared as holding the positions designated in a printed circular containing the names of the officers and directors of the company, and they were apparently treated as such officers.

At a meeting of its board of directors thereafter, S. was appointed engineer, and the firm, in which one of said attorneys was a partner, was appointed as attorneys and counsel. At the same meeting a statement was made by a committee, to whom the matter had been submitted, setting forth, in substance, the negotiations with plaintiff, the proposed contract with D., and transfer thereof to plaintiff, drafts of which were submitted. The board assented to and approved the same, and agreed that, upon execution of the proposed agreement between plaintiff and D., the former should be accepted and recognized as fully subrogated to the rights and substituted as to the liabilities of D. under his contract, and defendant's officers were authorized to execute the contract on its part. Plaintiff was, however, without fault on his part, denied the contract, although able and willing to perform it. In an action to recover for plaintiff's services and expenses, *held*, that, by the action of defendant's board of directors the negotiations with plaintiff might be deemed to have been recognized, and, in some sense, treated as having been made on behalf of defendant; that plaintiff had a right to assume that the persons with whom he negotiated legitimately represented defendant; that this, together with the fact that the moneys expended, were for the benefit of defendant, justified a finding of an agreement between plaintiff and defendant that he should have the contract and that the services were rendered and expenses incurred at the request of defendant, and that such findings were sufficient to sustain a recovery. *Wilson v. Kings Co. E. R. R. Co.*

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19. It was agreed between the parties that plaintiff should subscribe on joint account for a certain amount of railroad bonds offered for sale by a construction company, plaintiff to advance the money to pay the installments and to carry the subscription until disposed of for their joint benefit. By the terms of the subscription ten per cent of the subscription price was to be paid down

and the balance in installments as called for. In case of default in payment of any installment the company had the option to forfeit the subscription and all installments previously paid. Plaintiff paid the ten per cent down, but the bonds having declined in the market refused to pay subsequent installments, and the parties agreed to let the company exercise its option, which it did. In an action to recover one-half of the installment paid, held, that defendant was not bound to agree to the forfeiture and could have advanced the money and paid the calls, but having decided not to do so and the forfeiture having been declared with his concurrence, he was liable to pay his share of the loss. *Musgrave v. Buckley.* 506

20. In an action upon an undertaking alleged to have been given to secure the release of one H. from an order of arrest issued in a civil action brought in the Superior Court of the city of New York, the complaint alleged that the undertaking was executed and accepted under an agreement that, upon its execution, H. should be discharged from arrest, defendant agreeing to fully perform and abide by its terms. Said undertaking was entitled in the Supreme Court, and did not conform to the provision of the Code of Civil Procedure (§ 575), and plaintiff claimed to recover upon it, not as a statutory undertaking, but as an agreement valid at common law. Held, that, treating the undertaking as an agreement, the mistake in the entitling was not available; that no particular form was necessary, nor was it necessary that it should be entitled, and so the words "Supreme Court" might be treated as surplusage; and that this action was maintainable. *Carr v. Sterling.* 558

21. The deputy sheriff testified that he arrested H.; told him the amount of bail required, and that he and H. went to see the defendant herein; that H. asked her if she would go on a bond and she replied she would; that the witness and H. then went to the house of

L., the attorney in the action against H., and the bond was partially filled out; they then returned to the defendant, who signed the bond; she asked if she would be sufficient, and was told that L. said she would; that they then returned to L.'s house; he approved the bond, and thereupon H. was discharged. The defendant herein did not see plaintiff or his attorney before signing the bond. Held, that the evidence was sufficient to establish an agreement between defendant and plaintiff. *Id.*

— When contract for delivery of ice for term of years, required purchaser to pay weekly, and in case of default gave the vendor option to annul the contract, and vendor after default continued to deliver, but at a certain time demanded payment, which purchaser refused to make except on conditions. Held, that, conceding the vendor by continuing to deliver after default waived the right to annul, if purchaser on demand paid or offered to pay unconditionally, the latter having failed so to do could not claim a right to a further performance by vendor.

See Winchell v. Scott. (Mem.) 640

CONVERSION.

1. Plaintiffs executed to one F. a bill of sale of certain goods, absolute in form, but which was intended merely as security; the goods remained in plaintiffs' possession. Subsequently F., at the request of plaintiffs, transferred the goods by bill of sale to defendant. This was done under an arrangement that defendant should take possession of the goods and with the consent and approval of plaintiffs, and not otherwise, sell them and distribute the proceeds among plaintiffs' creditors as directed; the assignment being made to avoid trouble with creditors. Defendant sold the goods without such consent and retained the proceeds. In an action for conversion, held, that the transfer by F. was simply a formal waiver of his security and left plaintiffs at liberty to dispose

of the property; and that, as under the agreement with defendant, the latter had no power to complete the sale or deliver the property until he had obtained plaintiffs' approval as to price, the unauthorized sale was a conversion; and so, the action was maintainable. *Comley v. Daelian.* 161

2. An agent intrusted with property to sell at a price to be approved by his principal, if he sells without such approval, is liable for a conversion. *Id.*

3. Defendant held a chattel mortgage given to secure a debt payable upon demand, covering a quantity of iron ore lying upon a farm owned by E., the mortgagor. E. sold the farm and the ore to plaintiff, the deed being made "subject to the existing liens;" the latter made a tender to defendant of \$8,200 in payment and extinguishment of the lien of the mortgage. This defendant refused to accept on the ground that the amount tendered was insufficient, and thereafter entered upon the farm and sold the ore, becoming himself the purchaser. In an action for conversion it was conceded by defendant that the tender was sufficient in amount, but it was claimed that it was defective in form. Plaintiff testified, as to the tender, as follows: "I tendered and offered the money to him unconditionally and in payment and extinguishment of his lien." *Held,* that the tender was insufficient, as it was conditioned upon an extinguishment of the lien, which condition plaintiff had no right to attach to the acceptance; also, that, as plaintiff had not assumed payment of the debt, and took upon himself no duty or obligation in reference thereto, he could not make a legal and valid tender, as a tender before the debt was due would be ineffectual to destroy the security, and the debt only became due on demand of defendant or tender by the debtor. *Noyes v. Wyckoff.* 204

powers, duties and liabilities of agents of corporations and those of natural persons, unless expressly made by the act of incorporation or by-laws. *N. Y., P. & B. R. R. Co. v. Dixon.* 0

2. Plaintiff's complaint set forth, in substance, that he was employed by defendant to act as its attorney for one year under an agreement by which he was to receive, as compensation for his services, a transfer of 300 shares of its capital stock; that he performed the services and demanded the stock, but defendant refused to deliver the same. Plaintiff asked to recover the stock or its value. The answer admitted the employment, but denied any express agreement as to compensation. Upon the trial it appeared the agreement, substantially as averred in the complaint, was made on the part of defendant by its president. Defendant moved to dismiss the complaint on the ground that there was no proof of authority on the part of its president to make the contract. *Held,* that the motion was properly denied, as the authority of the president was admitted by the answer; that if defendant desired to present the question that the president was not authorized to contract to pay in stock, the attention of the trial court should have been called to it; and this not having been done, that it was not available on appeal. *Merrill v. Consumers' Coal Co.* 216

3. It appeared that defendant had, from its organization, employed attorneys by the year and paid them in its stock, that the contract had been made by the president, with the approval of the board of directors, and that plaintiff rendered the services called for by his contract with the knowledge of the directors. *Held,* that the evidence was sufficient to warrant a finding that the contract was approved of or acquiesced in by the directors. *Id.*

4. Plaintiff, who was an expert in railroad building, at the request of S., who assumed to be defendant's chief engineer, and, under an arrangement between him, S. and

CORPORATIONS.

- There is no difference between the

two attorneys, who assumed to act as defendant's counsel, to the effect that plaintiff should have the contract for building defendant's road, devoted his time for about nine months and expended moneys for traveling expenses, for plans and specifications and other necessary expenses, preparatory to making the contract and doing the work. Plaintiff made and submitted to one of the attorneys his proposal to construct and equip the road. A proposed contract was drawn up, but plaintiff was informed by one of the attorneys it was deemed advisable to have the contract made by defendant with one D., and by the latter assigned to plaintiff, to which the latter assented. Up to this time S. and the attorneys had not been formally employed by defendant, although their names appeared as holding the positions designated in a printed circular containing the names of the officers and directors of the company, and they were apparently treated as such officers. At a meeting of its board of directors thereafter, S. was appointed engineer, and the firm, in which one of said attorneys was a partner, was appointed as attorneys and counsel. At the same meeting a statement was made by a committee, to whom the matter had been submitted, setting forth, in substance, the negotiations with plaintiff, the proposed contract with D., and transfer thereof to plaintiff, drafts of which were submitted. The board assented to and approved the same, and agreed that, upon execution of the proposed agreement between plaintiff and D., the former should be accepted and recognized as fully subrogated to the rights and substituted as to the liabilities of D. under his contract, and defendant's officers were authorized to execute the contract on its part. Plaintiff was, however, without fault on his part, denied the contract, although able and willing to perform it. In an action to recover for plaintiff's services and expenses, held, that, by the action of defendant's board of directors the negotiations with plaintiff might be deemed to have been recognized, and, in some sense, treated as hav-

ing been made on behalf of defendant; that plaintiff had a right to assume that the persons with whom he negotiated legitimately represented defendant; that this, together with the fact that the moneys expended were for the benefit of defendant, justified a finding of an agreement between plaintiff and defendant that he should have the contract and that the services were rendered and expenses incurred at the request of defendant, and that such findings were sufficient to sustain a recovery.

5. Where the exercise of corporate acts is vested in a select body, an act done by the persons composing that body, in a meeting of all the corporators, is not a valid corporate act. *Landers v. F. St. M. E. Ch.* 626
Wilson v. Kings Co. E. R. R. Co. 487

See BANKS AND BANKING.
 INSURANCE (FIRE).
 INSURANCE (MARINE).
 MUNICIPAL CORPORATIONS.
 RAILROAD CORPORATIONS.

COUNTER-CLAIM.

One H. entered into a contract with defendant to furnish the latter all the boxes of a character specified it might require for one year from January first, at prices named; in case of failure it was provided that defendant might purchase the boxes it required in open market without notice, and charge H. with the excess over the contract-prices. On September 8, 1885, H. made a general assignment to plaintiff for the benefit of creditors; he claimed the right and continued to supply the boxes required until October fifth, when he informed defendant that he would be unable to fill further orders until an arrangement should be made of his affairs. Defendant thereupon contracted with another party to furnish the boxes required at prices in excess of those under the contract with H. Afterwards, at plaintiff's request, defendant permitted him to

deliver such further boxes as should be made from lumber already cut for the purpose. In an action to recover for the boxes delivered subsequent to the assignment, defendant set up and was allowed, as a counter-claim, damages for non-performance of the H. contract. *Held*, no error; that while plaintiff had no power, as assignee, to proceed in the performance of the contract without the consent of those beneficially interested in the trust, or the direction of the court, having adopted and proceeded to perform it, defendant's damages were available to him as a counter-claim. *Patton v. Royal B. P. Co.* 1

See PLEADINGs.

CUSTOM.

See USAGE.

DAIRY COMMISSIONER.

1. In an action brought by the dairy commissioner in the name of the People to recover the penalty imposed by the act of 1885 "to prevent deception in the sale of dairy products" (Chap. 188, Laws of 1885), for a violation of one of the provisions of the act (§ 7), which by the terms of the act (§ 21), does not apply "to any product manufactured or in process of manufacture at the time of the passage of this act;" it is not necessary for plaintiff to prove that the product in question was manufactured after the passage of the act; the burden is upon the defendant seeking the benefit of the exception to bring his case within it. *People v. Briggs.* 56

2. The complaint in such an action charged in one count both possession and sale of the prohibited article and violations of sections 7 and 8 of the act. At the opening of the trial defendants moved for a direction that plaintiff separate the allegations charging possession and

sale so as to present them as separate and distinct causes of action, and that plaintiff be required to elect upon which one of such causes he would rely; also, to direct a separation of the cause of action based upon the provisions of section 7 from that founded on section 8. *Held*, that these motions were addressed to the discretion of the trial court, and its decision thereon was not reviewable here. *Id.*

3. The court was requested, and declined, to charge the jury that they must be satisfied beyond a reasonable doubt of the violation by defendants before they could find against them. *Held*, no error. *Id.*

DAMAGES.

1. Where damages are claimed solely because of the failure of a lessor to give the lessee possession of the demised premises, its measure is the excess of the rental value over the rent reserved in the lease. *Dodds v. Hakes.* 261

2. In an action to recover unliquidated damages for breach of contract, unless the means are accessible to the party sought to be charged of ascertaining, by computation or otherwise, the amount to which plaintiff is entitled, he may not be allowed interest on the amount of damages found, and the submission of the question as to such allowance to the jury is error. *Mansfield v. N. Y. C. & H. R. R. R. Co.* 831

3. The question whether interest is recoverable in actions on contract does not rest in the discretion of a jury, but is one of law for the court. *Id.*

4. G. & M. contracted to construct for defendant the superstructure of an elevator, they to commence work within five days after notice from defendant's engineer that the foundations were ready, and to complete the structure within five months thereafter. Defendant agreed to pay, in addition to the

contract-price, \$500 for each day less than the time allowed occupied in the work; said engineer served the required notice, but at the time the foundations were not ready. In an action upon the contract plaintiff claimed, and the jury found, that had the foundations been completed and he not delayed by their unfinished condition, he would have completed the work thirty days before the end of the five months, for which he was allowed \$500 per day; he also claimed, and was allowed, damages for the inconvenience and extra work caused by the unfinished condition of the foundations. The court submitted to the jury the question and they allowed interest on the damages found. *Held* (POTTER, J., dissenting), error; that plaintiff was not entitled to interest on either item of damagea. *Id.*

5. But *held*, that the provision as to the *per diem* allowance was a valid agreement based upon a good consideration; and as the contractors, without fault on their part, were denied the right to perform, they were entitled to the benefits which would have resulted from performance, and so were entitled to the allowance for the thirty days. *Id.*

6. Where a plaintiff alleges in his complaint that his person has been injured by the negligence of defendant, and proves the negligence and injury, the law implies damages, and he may recover such as necessarily and immediately flow from the injury, under a general allegation that damages were sustained; but if he seeks to recover damages for consequences which do not necessarily and immediately flow from the injury, he must allege the special damages he seeks to recover. *Gumb v. Twenty-third Street R. Co.* 411

7. Prior to 1877 defendant operated a horse car railroad on Third avenue in the city of B. By an ordinance of the common council of the city, pursuant to the act of 1873 (Chap. 432, Laws of 1873), it

was authorized to run cars by steam motors between the city line on the south and Twenty-fourth street on the north. It did not stop its cars so propelled, however, at said street, but passed into and along it for some distance, backed them into Third avenue, and then in front of plaintiffs' premises, which are situated on the north-westerly corner of Third avenue and Twenty-fourth street, they were switched onto another track, making much noise, shaking plaintiffs' buildings, casting cinders, smoke and dust upon their premises, and interrupting the ordinary use of the street. In an action to recover damages, the evidence tended to show that said unlawful acts depreciated the rental value of plaintiffs' premises. *Held*, that such depreciation was a proper measure of damages. *Husner v. E. C. R. R. Co.* 438

8. Under the instructions of the court, recovery was had for such damages up to the time of the trial. No objection was made that the recovery should have been limited to the damages which accrued before the commencement of the action. *Held*, that the question could not be presented on appeal. *Id.*

9. *It seems* the recovery is a bar to any future claim for damages up to the time of trial. *Id.*

10. Defendant contracted to purchase of F. plaintiff's assignor, five hundred hides of a quality specified, to be selected by the vendor, shipped from Chicago and delivered to defendant at Owego, upon payment of draft for the purchase-price. F. shipped the hides by one of the usual railroad routes to Owego to his own order, accompanied by a draft, with directions to deliver on payment of the draft. The hides arrived in due time and in good order, and notice thereof was given to defendant, but he refused to receive and pay for them unless he had an opportunity of taking them to his factory and there opening and examining them.

Plaintiff offered to allow an examination at the railroad station, upon a platform or in the car, and notified defendant that, unless accepted in accordance with the contract, the hides would be returned to the seller at Chicago and there sold and defendant charged with the difference between the contract and selling-price, together with freight and expenses, and, upon defendant's refusal of the offer, the hides were reshipped and sold in accordance with the notice. In an action to recover damages for breach of the contract, *held*, that the difference between the contract and selling-price, with the expenses, was the proper measure of damages. *Sawyer v. Dean.* 489

DEBTOR AND CREDITOR.

1. The creditors of an insolvent lessee have no equitable claim to the profits issuing from leased land until after the landlord's claim for rent is satisfied. *Otis v. Conway.* 18
2. Plaintiffs executed to one F. a bill of sale of certain goods, absolute in form, but which was intended merely as security; the goods remained in plaintiffs' possession. Subsequently F., at the request of plaintiffs, transferred the goods by bill of sale to defendant. This was done under an arrangement that defendant should take possession of the goods and with the consent and approval of plaintiffs, and not otherwise, sell them and distribute the proceeds among plaintiffs' creditors as directed; the assignment being made to avoid trouble with creditors. Defendant sold the goods without such consent and retained the proceeds. In an action for conversion, *held*, that, in the absence of evidence of the acceptance or adoption of the arrangement by plaintiffs' creditors, they had no legal interest in defendant's promise as to distribution; that such direction was revocable, and a demand made before commencement of the action was sufficient notice of plaintiffs' intention to revoke it. *Comley v. Dazian.* 161

8. After the appointment of plaintiff as receiver in supplementary proceedings against J., the latter conveyed his farm to defendant A. in consideration of an agreement by A. to cancel and discharge a debt due from J. to him, pay all plaintiff's claims, as receiver, and also pay and discharge certain other debts owing by J. The creditors specified assented to the arrangement. A. paid the amount due upon the judgment plaintiff then represented, together with his claims for costs and expenses, but, before he had paid the other debts named, G., another creditor, obtained a judgment against J., to which the receivership was extended. This action was thereupon brought to have the said conveyance declared fraudulent and void as to J.'s creditors. It appeared that A. had acted in good faith, without knowledge of G.'s claim, and that the price agreed to be paid was a full and adequate consideration. *Held*, the action was not maintainable; that by his agreement, and the adoption thereof by the creditors, whose claims he assumed, A. became legally bound as principal debtor; and as the creditor represented by plaintiff had no prior claim to defendant, but both were general creditors with equal equities, the latter was entitled to the benefit of the general rule that, when the equities are equal the legal title must prevail. *Warren v. Wilder.* 209

4. Where there is an agreement or understanding between the parties at the time of the execution of a chattel mortgage that the mortgagor may sell or dispose of the mortgaged property or any portion thereof for his own use, the mortgage is void as to the creditors of the mortgagor. *Hangen v. Hachemester.* 586
5. The agreement or understanding may be proved by parol or may be inferred from the fact that the mortgagee permits the sale to be made. *Id.*

DEED.

1. Plaintiffs, for several years prior

to 1869, had occupied certain real estate as lessees under P.; in that year they acquired P.'s title. P. claimed under two deeds from the comptroller of the state, dated February 14, 1862, and December 12, 1868, given upon sales of the land for taxes, and which purported to convey an absolute estate in fee simple. Plaintiffs continued in possession of this land until the commencement of this action in 1883, which was brought to compel the determination of a claim made by defendant to said real estate adverse to plaintiff's title. The answer denied plaintiff's title and possession and alleged title in defendant. Defendant claimed under a deed to him, dated October 27, 1881, executed by one S., whose grantor C. held title to the property from November 14, 1854. Held, that, as at the time of the execution of the deed to defendant the land was in the possession of a person claiming under a title adverse to defendant's, his deed was void (1 R. S. 732, § 147), and, as against him, plaintiff was entitled to possession without regard to the question as to the validity of the comptroller's deeds; that if there were such defects in the proceedings to sell the land for taxes as to render those deeds void, the title to the land was still in C., defendant's remote grantor, and upon that title must be founded all proceedings to recover possession from the plaintiffs. *Pearce v. Moore.* 256

2. In an action of ejectment plaintiff claimed under a deed which was delivered to her husband in trust for her benefit by the grantor, with a request that it should be kept secret until her death. Plaintiff was in the house when the deed was prepared and executed and was present at a conversation shortly before when the grantor announced her intention to convey the property to plaintiff. Held, the circumstances authorized the presumption that the deed was delivered with the intent that it should take effect as a present conveyance and that it was accepted by plaintiff, and this having been found by the jury, that it became

operative as a conveyance. *Crain v. Wright.* 807

— As to authority of commissioners of land office to grant lands under the water of navigable streams. See *Rumsey v. N. Y. & N. E. R. R. Co.* 428

DEFINITIONS.

1. The term "audit," as applied to the action of a board of town auditors, means to hear and examine; it includes both the adjustment or allowance and the disallowance or rejection of an account. *People ex rel. v. Barnes.* 817
2. A nonsuit on trial by jury is not a "decision" within the meaning of the Code of Civil Procedure affirming the rule of the common law, that an action to recover damages for a personal injury abates on the death of the plaintiff, except where "a verdict, report or decision" has been rendered upon the issue (§ 764), nor is an order of General Term reversing a judgment entered on the nonsuit; that word refers to a decision made by a court on trial without a jury. *Corbett v. Twenty-third St. R. Co.* 579

DELIVERY.

In an action to recover possession of personal property, it appeared that plaintiff contracted to sell to one T. the property in question, consisting of two printing presses, with the necessary shafting, together with a quantity of type and other printers' supplies, for \$1,100.95, \$500 to be paid in cash and a mortgage on the property to be given by T. for the balance. Plaintiff at once commenced to put up the shafting, set the presses and deliver the type and other materials. When the work was about half done plaintiff demanded the cash payment agreed upon. T. paid \$250 and plaintiff continued putting the presses in working order, transferring the type and other materials. Immediately after the completion of the work plaintiff's president

went to T.'s office to collect the balance and there learned that T. had absconded. On the same or the next day defendant, as sheriff, levied on the goods under an attachment against T. Plaintiff's president immediately asserted to the attaching creditor that it had not parted with possession of the property, and upon refusal to surrender it, brought this action. At the close of plaintiff's case the court directed a verdict for defendant. *Held*, error; that the question as to whether there was a delivery sufficient to pass title should have been submitted to the jury; also that by the payment of the \$250 T. did not, if title remained in plaintiff, acquire an interest to that amount, which was subject to attachment. *E. S. T. F. Co. v. Grant.* 40

DEMAND.

Where an executory contract for the sale of chattels provides that the purchase-price shall be paid in installments, and that title shall not pass until the price is fully paid, and the vendor permits the vendee to retain possession and make other payments, after the whole contract-price is due, he may not seize the property and terminate the contract for non-payment until he has demanded payment. *O'Rourke v. Haddock.* 541

DETERMINATION OF CONFLICTING CLAIMS TO REAL PROPERTY.

1. An action to compel the determination of a claim to real property is not maintainable against an infant. *Weiler v. Nembach.* 83
2. The exception of infants and certain other classes of persons in the provision of the Code of Civil Procedure (§ 1638), authorizing such an action, is not repealed or affected by the provision (§ 1688), declaring that any action specified in the title containing it "may be maintained by or against an infant in his own name," etc. This pro-

vision does not give a right of action, but only provides that an action may be maintained by or against an infant where the right of action is given by other provisions of the title. *Id.*

DEVISE.

The will of W. gave fifty acres of land to his widow "to have and to hold for her benefit and support." In an action of ejectment, brought by a grantee of the widow, *held*, that no intent to pass a less estate than a fee could "be necessarily implied in the terms" of the devise; and that the widow took a fee under the provision of the Revised Statutes (1 R. S. 748, § 1), providing that the term "heirs," or other words of inheritance, shall not be requisite to convey a fee, and that a devise will pass all the estate of the testator "unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied." *Crain v. Wright.* 807

DOCKS.

See WHARVES.

EJECTMENT.

1. In 1855 H. contracted to sell certain premises to defendant, who covenanted to pay the purchase-price in annual installments; the deed to be delivered when the whole was paid. It was provided in the contract that in case of non-performance on the part of defendant of any of his covenants the contract should become void and H. have the right to enter into possession, "the same as if the contract had never been signed." Defendant entered into possession and occupied until March, 1863, paying none of the principal, but paying the interest under an oral agreement. He then transferred his interest in the contract to J., who continued to occupy, under a similar verbal agreement, until his

death in 1870. He left surviving him his widow and three children, all infants, who had no estate except their interest in the contract. The widow occupied under a similar verbal arrangement, paying interest up to February 1, 1875, but none of the principal. Before that time one of the children died a minor and intestate. Since that time no interest has been paid. Prior to February, 1877, the widow advised H. that she was unable to pay and asked him to abandon the contract, to which he consented. She had arranged with plaintiff that he would pay her \$289.50, and pay H. the amount unpaid on the contract if the latter would deed to him; this H. agreed to do. Thereupon the widow, acting on behalf of herself and her children, assigned the contract to plaintiff, agreeing to surrender possession April 1, 1877. In pursuance of this arrangement the contract was surrendered to H., who deeded the premises to plaintiff, the latter paying to the widow the sum agreed. In 1876 defendant rented part of the premises of the widow, and in April of that year was appointed general guardian of the children. After the widow left the premises he occupied the whole premises under a claim of right as guardian, and refused, on demand by plaintiff, to deliver up possession. He tendered to plaintiff a sum greater than the contract-price and interest unpaid, but conditioned upon the latter's executing a deed to the children. In an action of ejectment, held, that on the death of J. the obligation to pay devolved upon his widow and heirs, and upon demand made of either of them and refusal to pay, plaintiff was entitled to recover possession; that neither the infancy nor widowhood released or modified the obligation or extended the time of payment; that, conceding the right to a specific performance had not wholly ceased to exist, but remained suspended and could have been revived by a tender, that mode was insufficient, because coupled with a condition that plaintiff would convey absolutely, although he had acquired and was entitled to retain the widow's in-

terest; also, that there was no equitable defense in favor of defendant, who, while standing in the relation of tenant to plaintiff, procured himself to be appointed guardian of part of the owners, and thereupon denied the title of his landlord and claimed the right to occupy the whole premises. *Cornell v. Hayden.* 271

2. The will of W. gave fifty acres of land to his widow "to have and to hold for her benefit and support." In action of ejectment, brought by a grantee of the widow, held, that no intent to pass a less estate than a fee could "be necessarily implied in the terms" of the devise; and that the widow took a fee under the provision of the Revised Statutes (1 R. S. 748, § 1), providing that the term "heirs," or other words of inheritance, shall not be requisite to convey a fee, and that a devise will pass all the estate of the testator "unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied." *Crain v. Wright.* 307
3. It appeared that plaintiff's deed was delivered to her husband in trust for her benefit by the grantor, with a request that it should be kept secret until her death. Plaintiff was in the house when the deed was prepared and executed, and was present at a conversation shortly before, when the grantor announced her intention to convey the property to plaintiff. Held, the circumstances authorized the presumption that the deed was delivered with the intent that it should take effect as a present conveyance, and that it was accepted by plaintiff, and this having been found by the jury that it became operative as a conveyance. *Id.*

EQUITY.

1. The creditors of an insolvent lessee have no equitable claim to the profits issuing from leased land until after the landlord's claim for rent is satisfied. *Otis v. Conway.* 13

2. Plaintiff's complaint alleged, in substance, that he was the holder of a chattel mortgage covering a portion of the furniture and fixtures of a hotel; that defendant H. was the holder of two junior mortgages covering portions of said property, and some not covered by plaintiff's mortgage; that defendant W. held another mortgage covering all of said property; that the sheriff, by virtue of a judgment and execution in favor of defendant L. against the person holding the property and carrying on the hotel, had levied upon said property and was proceeding to sell the same; that W., L. and the sheriff claimed their liens were prior to that of plaintiff's mortgage, because of his omission to renew it by refiling; that the property, if sold in bulk, would produce enough to pay all the liens, but would bring much less if sold separately with the conflicting claims thereon. The complaint asked for the appointment of a receiver, with authority to sell the property in bulk and distribute the proceeds under the direction of the court and in accordance with the rights and priorities of the parties. Held, that the complaint set forth various subjects of equitable jurisdiction, i. e., the foreclosure of chattel mortgages, the determination between creditors of the extent and priority of conflicting liens, the advantages to creditors of a sale in bulk instead of in separate parcels, each of which was sufficient to maintain an action in equity, and their combination in one complaint would not defeat the action; also, that, in the absence of a demurrer or answer presenting the question that plaintiff had a remedy at law, that objection could not be raised. *Ostrander v. Weber.* 95

3. The defendant, in an equity action, in order to insist that an adequate remedy exists at law, must set it up in his answer. *Id.*

4. The trial by jury of any questions of fact in issue in an equity action is within the discretion of the trial court. (Code of Civil Pro. § 971.) It may adopt or dis-

regard the finding of the jury, or set aside the verdict and grant a new trial, at its discretion. *Randall v. Randall.* 499

5. In an equity action the complaint cannot be dismissed on a trial of questions of fact by the jury. A verdict must be rendered upon all the questions submitted and the case afterwards brought to a hearing before the court the same as if there had been no verdict: *MacNaughton v. Osgood.* 574

ESCAPE.

— *Where affidavit annexed to petition for discharge of one under arrest on execution is defective because not made on day of presentation, but judgment-creditor appears on presentation of petition and does not raise objection, this is a waiver and the objection may not be raised in action against sheriff for an escape.*
See Shafer v. Risely. 23

ESTOPPEL.

1. The estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, were comprehended and involved in the thing expressly stated and decided, whether they were or were not actually litigated or considered. It is not necessary that issue should have been taken upon the precise point controverted in the second action. *O. P. P. & M. Co. v. Walker.* 7

2. A lessee in possession is estopped from contesting with his lessor the validity of the contract under which he has acquired possession. *Mayo, etc., v. Huntington.* 681

EVIDENCE.

1. In an action to recover possession of certain goods alleged to have

been purchased by M., defendants' assignor, of plaintiffs by means of false and fraudulent representations and with the intent not to pay therefor, plaintiff gave evidence tending to show the making of the false representations charged and that the sale was induced thereby. M., as a witness for defendant, testified that he had never made any such representations. Upon cross-examination he was asked if he had not made representations, similar to those charged, to other persons named, of whom he had purchased goods at about the same time as the purchase in question; this he denied. Held, that it was competent for plaintiff to prove by the persons named that M. did make such representations to them at the time of the purchases, and that the exclusion of the testimony was error; that the testimony was not only competent as evidence in chief, but was admissible for the purpose of contradicting M.'s testimony and impeaching his credibility, and it was not discretionary with the court to exclude it. *Ankermann v. Tuck.* 51

2. A party has the right to impeach or discredit the testimony of his opponent; such evidence is always competent. He may also contradict a witness against him as to any matters upon which the witness has given evidence in chief, provided it is not collateral to the issue. *Id.*

3. If the testimony sought to be contradicted has reference to statements made to others, the attention of the witness should first be called to the time, place and person to whom the statement is claimed to have been made, and if denied, such person may then be called to contradict him. *Id.*

4. In an action on a draft drawn upon and certified by defendant, one of the plaintiffs, as a witness, was asked on cross-examination: "What do you understand to be the contract of certification of a check or draft?" This was objected to and excluded. Held,

no error. *Clews v. Bank of N. Y. B. Assn.* 71

5. Defendants employed plaintiff to obtain subscriptions for an encyclopedia and other publications issued in numbers, agreeing to pay him "fifteen dollars an order for each and every order" obtained for the encyclopedia and four dollars an order for the other publications. In an action upon the contract defendants offered to prove that in the subscription book business the words used had a definite and well-established meaning; that the words "fifteen dollars an order for each and every order for the encyclopedia" were well understood to mean every order under which five volumes have been taken and paid for by the subscriber and that four dollars an order for the other publications meant an order upon which ten parts or numbers of the publication had been taken and paid for. This was objected to and excluded. Held, error. *Newhall v. Appleton.* 140

6. Where words used, in their application to an instrument of which they are a part, are not entirely intelligible, oral evidence of the circumstances attending its execution may, as between the parties, be admissible to aid in the interpretation. *Schmittler v. Simon.* 176

7. A draft was drawn upon defendant for \$900, payable at a time specified, with direction to charge the same against the drawer "and of" his mother's estate. Following the name of defendant in the draft was the word "executor." He accepted it, adding to his name the same word. In an action upon the acceptance, it appeared that defendant was executor of the will of R., who was the mother of the drawer of the draft. The draft was indorsed over by the payee to his wife, the plaintiff. There was evidence tending to show that the draft was taken by the payee for plaintiff or with a view to transfer it to her. Defendant offered to show that when the draft was drawn it was understood between the drawer, payee and plaintiff

- that it was to be paid out of the drawer's interest in the estate; that defendant then stated in their presence he would not accept or become liable personally, and it was agreed that he should accept in his capacity as executor, to be paid only out of the drawer's interest in the estate. This evidence was objected to and excluded. *Held*, error; that the testimony was competent as bearing upon the understanding of the relation and the character of the liability defendant assumed by its acceptance. *Id.*
8. Plaintiffs, who were diamond merchants, delivered to one M., a diamond broker, a pair of diamond ear-knobs, taking from him a receipt as follows: "Received from Alfred H. Smith & Co. * * * a pair of single stone diamond ear-knobs * * * on approval to show to my customers. Said knobs to be returned to said A. H. Smith & Co. on demand." M. sold the diamonds to defendant C. In an action to recover their possession plaintiff offered to show that the words "on approval" had a recognized meaning in the diamond trade well known to M.; that they were understood not to confer a power of sale, but authority merely to show diamonds to a customer and report to the owner. This evidence was excluded. *Held*, error; that the receipt upon its face did not import authority to sell; that with the words "on approval" stricken out it would be a complete contract, giving M. simply authority "to show," and binding him "to return on demand;" that those words, as ordinarily interpreted, were neither inconsistent with the authority or the obligation; and as it was to be presumed they had some meaning to the parties, and as this meaning did not appear from the contract, oral evidence was competent to show the intent of the parties. *Smith v. Clews*. 190
9. Evidence is always admissible to explain the meaning of terms used in any particular trade when their meaning is material to construe the contract, this rule extends to forms of expression as well as to single words. *Id.*
10. Evidence of usage is also admissible to apply a written contract to the subject-matter of the action, to explain expressions used in a particular sense by particular persons as to particular subjects and to give effect to language in a contract as it was understood by those who made it. *Id.*
11. Also, *held*, that C.'s title to the diamonds depended wholly on M.'s authority to sell, and he was bound by such limitation as the owner had placed upon M.'s possession, and unless authority to sell existed, C., although acting in entire good faith, obtained no title; hence it was of no consequence whether or not C. knew of the custom of the trade. *Id.*
12. Defendants executed to plaintiff an instrument in writing by which, for a valuable consideration, they agreed that F., who the instrument stated "has purchased, or is about to purchase, anthracite coal" of defendant, "shall pay said company at such time or times, and at such prices as may be agreed upon" between them, "for all coal that may be shipped to him up to the 1st day of May, 1882." In case of default of F. defendants agreed "to pay for the same, whether the indebtedness be in open account or embraced in notes, drafts or bills of exchange." In an action upon the instrument the defense was that plaintiff had extended the term of credit given to F., at the time coal was purchased, without the assent of defendants. Plaintiff offered to prove the terms of the first contract of sale made with F. after the execution of the instrument. This offer was rejected. *Held*, error. *D., L. & W. R. R. Co. v. Burkard*. 197
13. In an action against the owner of a building in the city of New York used for business purposes, in which there is a hoisting elevator, for injuries alleged to have been caused by his negligence in failing to comply with the requirements of the statute of 1874 (Chap. 547, Laws of 1874), requiring that the openings in each floor shall be protected by such a substantial railing,

- and trap-doors to close the same, as shall be approved by the superintendent of buildings, *held*, that, for the purpose of showing that drawings or diagrams of the buildings presented by defendants on the trial did not correctly show the situation at the time of the accident, it was competent for plaintiff to prove that changes had been made since that time. *McRickard v. Flint.* 222
14. It may be shown by oral evidence, in defense against or avoidance of an award, that the arbitrators acted in excess of their jurisdiction. *Dodds v. Hakes.* 260
15. An original entry or a memorandum, made by a witness at the time of a transaction, is admissible in evidence as auxiliary to his testimony only when he is unable to distinctly recollect the fact without its aid. The evidence is admitted only as a matter of necessity. Where the witness has a distinct recollection of the essential facts to which the entries relate, the primary common-law proof may be furnished, the necessity for the secondary evidence does not arise, and so it is incompetent. *Nat. Ulster Co. Bk. v. Madden.* 280
16. After the assignment of a mortgage, which was not recorded, the mortgagee, at the request of the owner of the equity of redemption, and without the knowledge or consent of the assignee, caused the same to be canceled of record. Said owner then executed another mortgage on the premises to mortgagees who had full notice of the facts; they assigned the same to *bona fide* purchasers, who foreclosed the mortgage, and on the foreclosure sale the premises were purchased by the mortgagees in the name of an agent or representative, who conveyed the same to a person having full knowledge of the equities of the holder of the original mortgage. Upon the trial defendant Mc.N., who executed the second mortgage, as a witness for plaintiff, was permitted to testify to conversations between him and one of his mortgagees, since de- ceased. This was objected to as incompetent under the Code of Civil Procedure (§ 829). *Held*, untenable, as plaintiff did not derive title to her mortgage from said mortgagor, and so the witness was not called in his own behalf or that of one who had succeeded to his interest. *Clark v. McNeal.* 287
17. In an action to recover damages for injuries received through the alleged negligence of defendants, it appeared that they were copartners in business as warehousemen, and as such occupied a pier. By their consent a steamer was made fast to their pier, landed its passengers and discharged cargo; that plaintiff in the performance of his duty as an employe of the owners of the steamer, was assisting in carrying baggage from the vessel on to the pier and within the inclosure where the baggage of the passengers was being deposited, when one of the doors to an opening in the enclosure of the pier fell over and struck him, inflicting the injuries complained of. The doors ran upon wheels overhead, which, at times, were thrown off the rail on which the wheels ran. Plaintiff gave evidence tending to show that defendants had notice of the dangerous character of these doors and that some of them had fallen before. *Held*, that it was proper to show not only what was said to a deceased member of the defendants' firm, but what he said in relation to the falling of the door or any of them at any time before the accident, and while the doors and the manner of operating them remained the same. *Newall v. Bartlett.* 399
18. In an action to recover damages for personal injuries to plaintiff, and also for injuries to his wagon, the complaint alleged that he was "put to expense in repairing the same and endeavoring to be healed of his own hurts, and prevented from going on with his business." There was no allegation that he expended money in hiring others to work in his place. Plaintiff was permitted to testify, under objection, that the evidence was not within the issue, that while

- suffering from his injury he employed two men to work in his place and paid them \$185. *Held, error.* *Gumb v. Twenty-third St. R. Co.* 411
19. Plaintiff was permitted to testify, under objection and exception, as to the amount paid for repairs to his property, without showing that the repairs were proper or worth the sum paid. *Held, error.* *Id.*
20. Plaintiff was permitted to show how much his physician charged without giving evidence of payment, or any evidence of the value of the services. *Held, error.* *Id.*
21. In an action to recover damages for fraud in the sale or exchange of a lot of marble, the complaint alleged, and plaintiff's evidence tended to show, that he agreed to sell a hotel property for \$5,100 to defendant, who agreed to pay by assuming a mortgage of \$1,000 thereon, paying plaintiff \$1,100 in cash, and transferring to him a lot of marble which defendant represented to have cost him and to be of the market-value of \$8,000. It was further alleged that defendant colluded with one F. to appraise the marble at a fictitious value, and that F. did so. It was conceded on the trial that the actual cost and value of the marble did not exceed \$1,000. Defendant denied having made false statements as to the cost of the marble, and gave evidence which, if credited, would have justified a finding that both he and F. told plaintiff the marble cost between \$800 and \$1,000, and gave evidence tending to disprove that a fixed price was agreed upon in the exchange for the plaintiff's property. Defendant then offered to prove that at the time of the sale the hotel property was not worth \$5,100, or anything like that sum. This was excluded on plaintiff's objection, and defendant excepted. *Held, error;* that the fact as to the agreement being in dispute, the real value of plaintiff's property was an element for the jury to consider in determining which version was correct. *Weidner v. Phillips.* 458
22. In 1887 one V. R., who was engaged in keeping a saloon in the city of New York, died. The public administrator was appointed administrator of his estate, and as such took possession of and sold the furniture, fixtures, etc., of the saloon to plaintiff, who thereupon took possession and continued the business with the property so purchased. Defendant entered the premises and took away the property so purchased, claiming title thereto under a chattel mortgage executed by the deceased in 1876. The mortgage, by its terms, covered all the goods and chattels in the saloon belonging to the mortgagor mentioned in a schedule annexed. The schedule enumerated all the furniture and fixtures in the saloon and the stock of wines, ales, liquors and cigars. The mortgage provided that until default in payment the mortgagor was to remain in quiet and peaceable possession of the goods and chattels and the full and free enjoyment of the same. In an action for the alleged conversion of said property evidence was given tending to show plaintiff's receipts from sales made and the expenses each day for two weeks before the property was taken. After it had been received it was objected that no claim was made for such damages. The objection was overruled and an exception taken. *Held,* that the exception was not available here, the objection not having been made in time and no motion having been made to strike out the evidence; also, that the evidence was proper in determining the damages arising from the destruction of plaintiff's business, which was one of the items of damage set forth in the complaint. *Hangen v. Hachemeister.* 566
23. It appeared that a controversy arose as to the validity of the mortgage between the public administrator and defendant's attorney, who had been employed to foreclose it and take possession of the property. Evidence was given tending to show that there was an arrangement between them, by which the property was to be sold and the proceeds retained subject

to the determination of the question as to the validity of the mortgage. This was objected to as irrelevant and incompetent. The objection was overruled. *Held*, no error. *Id.*

24. Plaintiff was allowed to testify as to the cost of articles purchased by him from other parties than the administrator, which he claimed were taken by defendant, and which had been purchased within three weeks of the sale and, as the evidence showed, had not changed in value, also, as to the amount he paid for the property purchased at the administrator's sale. He had testified, in substance, that he was familiar with such property, had bought and sold it, and for eight years been engaged in the business of keeping a saloon and in buying and selling fixtures and saloons. *Held*, that the evidence was properly received; also, that the witness was competent to express his judgment as to the value of the property. *Id.*

— *Where upon trial of an action to set aside an assessment as illegal, a defect de hors the record not set forth in complaint is improper, and if received under that specific objection, the question whether the defect so proved invalidates the assessment is not presented on appeal from judgment sustaining the assessment.*

See O'Reilly v. City of Kingston. 439

EXCEPTION.

1. The case showed that defendant requested the court to charge six propositions set forth; it did not show what disposition was made of them. There was an exception "to each and every refusal of the court to charge each and every proposition requested by defendant's counsel." *Held*, that the exception was not available. *Tousey v. Roberts.* 312
2. In order to raise any question upon the ruling of the trial court, as to requests to charge, for review in this court the exception must be specific and point out the

particular request to which it is intended to apply. *Newall v. Bartlett.* 399

3. To make exceptions to a refusal of a referee to find a fact sufficient ground for a reversal, it must appear that had he found as requested the result would have been affected. *Baldwin v. Doying.* 462

EXECUTIONS.

See SHERIFFS.

EXECUTORS AND ADMINISTRATORS.

1. In 1887 one V. R., who was engaged in keeping a saloon in the city of New York, died. The public administrator was appointed administrator of his estate, and as such took possession of and sold the furniture, fixtures, etc., of the saloon to plaintiff, who thereupon took possession and continued the business with the property so purchased. Defendant entered the premises and took away the property so purchased, claiming title thereto under a chattel mortgage executed by the deceased in 1876. The mortgage, by its terms, covered all the goods and chattels in the saloon belonging to the mortgagor, mentioned in a schedule annexed. The schedule enumerated all the furniture and fixtures in the saloon and the stock of wines, ales, liquors and cigars. The mortgage provided that until default in payment the mortgagor was to remain in quiet and peaceable possession of the goods and chattels and the full and free enjoyment of the same. In an action for the alleged conversion of said property there was evidence that the mortgagor had loaned the mortgagor money to carry on the saloon; that the latter continued the business until about the time of his death, conducting it in the usual way; that there were other creditors of the deceased and that he died insolvent. *Held*, that the jury had a right to infer from the facts that it was mutually un-

derstood between the parties that the mortgagor should have the right to sell and dispose of the merchandise embraced in the mortgage for and on his own account, and that with this finding the mortgage was void as against creditors; that the administrator represented the creditors as well as the estate, and as such had the right to disaffirm the mortgage. *Hangen v. Hachemeister.* 566

2. It appeared that a controversy arose as to the validity of the mortgage between the public administrator and defendant's attorney, who had been employed to foreclose it and take possession of the property. Evidence was given tending to show that there was an arrangement between them, by which the property was to be sold and the proceeds retained subject to the determination of the question as to the validity of the mortgage. This was objected to as irrelevant and incompetent. The objection was overruled. *Held,* no error. *Id.*

FACTOR.

1. Unless the character or quality of goods consigned to a commission merchant to sell is communicated to him by the consignors, it is his duty to ascertain what they are in that respect and put them upon the market only as such. No authority to undertake that the goods are in any respect other or different from what they are may be inferred from the simple power to sell. *Argersinger v. MacNaughton.* 585
2. In an action to recover damages for an alleged breach of warranty, it appeared that defendant, a commission merchant, as such, sold to plaintiffs a quantity of antelope skins, with a warranty as to quality, and that there was a breach of such warranty; that plaintiffs knew defendant was acting as agent in making the sale, but defendant did not disclose to them, nor did it appear that they knew the names of the principals. It did not appear that the principals

gave defendant any description of the quality or condition, or that he acted otherwise than on his own knowledge or judgment in that respect in making the sale and warranty, nor was it found that he had authority from his consignors to warrant the goods. Evidence was given by defendant that it was the custom in the trade for commission dealers not to warrant goods sold. *Held,* that the warranty was defendant's undertaking and he was liable for its breach; that in such case the presumption is that the responsibility is upon the person with whom the vendee deals, and he is not required to look elsewhere. *Id.*

3. Also, *held*, that plaintiffs were not required to return the goods on discovery of the breach, but had the right to retain them and seek their remedy upon the warranty. *Id.*

FINDINGS OF LAW AND FACT.

To make exceptions to a refusal of a referee to find a fact sufficient ground for a reversal, it must appear that had he found as requested the result would have been affected. *Baldwin v. Downing.* 452

FIRE DEPARTMENT.

On *certiorari* to review the action of the Board of Fire Commissioners of the city of New York in transferring the relator from duty as chief of battalion in the fire department to that of foreman, it appeared from the return of the board that in July, 1884, one McC. held the position of second assistant chief of the department; that the board of fire commissioners adopted a resolution discharging him for incompetency and incapacity; and thereafter, on August 4, 1886, in good faith, believing said position to be vacant, by resolution promoted one R. to it from that of chief of battalion, and promoted the relator to the latter position from that of foreman. This resolution did not state that the promo-

tion was made to fill a vacancy. Subsequently, on *certiorari*, the proceedings of the board in the removal of McC. were adjudged void and he was reinstated, and the persons so promoted were transferred back to their former positions. *Held*, that the return of the board must be taken as true; that its resolution promoting the relator must be construed in connection with the facts appearing, and when so construed, it appeared that no new office was created or intended thereby, but that the relator's promotion was to fill a supposed vacancy which did not, in fact, exist; that the proceedings of the board were not in conflict with the provisions of section 440 of the New York Consolidation act (§ 440, Chap. 410, Laws of 1882), and were regular and proper. *People ex rel. v. Fire Comrs. of New York.* 67

iff's equity at once reattached.
Clark v. McNeal. 287

FORMER ADJUDICATION.

1. The estoppel of a former judgment extends to every material matter within the issue which was expressly litigated and determined, and also to those matters which, although not expressly determined, were comprehended and involved in the thing expressly stated and decided, whether they were or were not actually litigated or considered. It is not necessary that issue should have been taken upon the precise point controverted in the second action. *C. P. P. & M. Co. v. Walker.* 7
2. In proceedings by *mandamus*, instituted by a commissioner of highways, to compel the board of town auditors to audit certain claims against the town for costs awarded against the relator and paid by him in actions brought by him as such commissioner, and for moneys expended by him in that capacity, it was admitted that the claims had been presented to former boards and rejected by them on the ground that the town was not legally liable to pay them. *Held*, that the former adjudications were conclusive, and that until reversal they formed a bar to a reauditing of the bills and to the application for a *mandamus* to compel it. *People ex rel. Barnes.* 817
3. In an action upon an undertaking, given on appeal from a judgment, brought by plaintiff as assignee of the judgment, the defense was that S., plaintiff's assignor, obtained the judgment as trustee of an express trust, for R., and that L., the judgment-debtor, had paid the judgment to R., who acknowledged satisfaction thereof. The assignment of the judgment to plaintiff was executed and recorded prior to the alleged payment and satisfaction. Neither the defendants N. or S. had notice of the assignment at the time of payment other than that given by the assignment record. *Held*, that the defense was

FORECLOSURE.

After the assignment of a mortgage, which was not recorded, the mortgagee, at the request of the owner of the equity of redemption and without the knowledge or consent of the assignee, caused the same to be canceled of record. Said owner then executed another mortgage on the premises to mortgagees who had full notice of the facts, they assigned the same to *bona fide* purchasers, who foreclosed the mortgage, and on the foreclosure sale the premises were purchased by the mortgagees in the name of an agent or representative, who conveyed the same to a person having full knowledge of the equities of the holder of the original mortgage. In an action to foreclose said mortgage, *held*, that it was a lien prior to the interest of said subsequent mortgagees or the grantee of their agent; that while, upon transfer of the subsequent mortgage to *bona fide* purchasers, it became in their hands a lien prior to that of plaintiff's mortgage, owing to the protection afforded by the recording act, upon purchase of the premises by one acting for the mortgagees, plaint-

not available; that, as S. brought the action, wherein the undertaking was given, in his own name, not as agent, the question as to his right to recover was an issuable fact, and was necessarily determined in that action, and defendants were concluded by their agreement to pay the judgment, if it was affirmed, from again bringing into question any issuable facts so determined; that, conceding the judgment recovered by S. was for the benefit of R., S. was the legal owner, and although, had the settlement been effected with the latter while S. was such legal owner, he would have been bound by it, yet he had the power to sell and transfer the judgment, and having done so, R.'s interest therein ceased and plaintiff, the assignee, became the legal and equitable owner, and his rights as such were not affected by the payment to R. *Seymour v. Smith.* 482

4. Plaintiff contracted to sell to defendant a canal boat and furniture, and four mules with their harnesses, on credit, the purchase-price to be paid in installments. The contract provided that defendant was to have immediate possession, but that title to the boat should not pass until the purchase-price was paid. To secure the payment defendant executed to plaintiff a mortgage upon another canal boat. Subsequently, and after the whole purchase-price became due, plaintiff took possession of the mules and advertised them for sale, together with the boat sold with its furniture; and on the same day, by separate notice, advertised the other boat for sale under and by virtue of the chattel mortgage, and then brought this action to recover possession of the two boats, their furniture, etc. These were seized by the sheriff and delivered by him to plaintiff, who sold them pursuant to said advertisements. It appeared that defendant had commenced an action against plaintiff for an accounting, claiming that the purchase-price had been paid and asking that the notes given for the purchase-price, the chattel mortgage and contract be sur-

rendered, and that defendant be restrained from selling the property described in the contract and mortgage. On trial of said action the referee found that the plaintiff was still indebted to the defendant in the sum of \$126.88 and directed a dismissal of the complaint. Judgment was entered pursuant to the report. Held, that the judgment-roll was conclusive evidence in this action as to the amount unpaid. *O'Rourke v. Haddock.* 541

FORMER SUIT PENDING.

1. A pending action, brought to establish title to or a lien upon land, does not of itself, nor does a duly recorded notice of its pendency, make the title defective or create a lien on the land. *Hayes v. Nourse.* 595
2. The fact that all the heirs of a deceased plaintiff, in an action to compel a specific performance by the vendor of a contract for the sale of land, are infants is not a legal excuse for a failure on their part to perform the contract of their ancestor, and the *laches* which would have barred the action had he survived, will bar its prosecution by them. *Id.*
3. A purchaser *pendente lite* of the subject of litigation in such an action, if he buys in good faith, and without actual notice of the claims of the litigants, is not affected by the suit pending, unless it has been prosecuted with due diligence. *Id.*
4. The right of the plaintiff in such an action to revive and continue it against the successors in interest of a deceased defendant may be lost by long delay in making the application, especially if the successors are purchasers in good faith, and if the condition and value of the property have greatly changed, and the only witnesses by whom the facts in issue could have been established are dead. *Id.*
5. In an action by the vendee to

recover back a payment made upon an executory contract for the sale of land, on the ground that the title was defective, it appeared that, in 1819, K. owned the premises in fee, and was in possession; he died in 1824 seized of the premises, which, by his will, he devised to his five children. Four of them deeded their interests to the fifth; the deed was recorded, and the grantee took and remained in possession until 1854, when she conveyed the premises to P., who took and remained in possession until 1884, when he conveyed them to defendant. The contract for the sale was made in March, 1885. The facts upon which the objection to the title was based were these: In July, 1836, a bill in chancery was filed by the heirs of one McG. against the devisees of K., and on the same day a notice of the pendency of the action was also filed. The bill alleged these facts: In 1819 an executory contract for the sale of the premises by K. to McG. for \$1,200 was executed by them; \$200 was paid thereon by the vendee, who entered into possession, and, in 1820, expended \$2,000 in making improvements upon the premises. To complete the improvements McG. borrowed \$300 of K. upon an oral agreement that K. would convey the lots to McG. and receive from him a mortgage as security for the loan and the balance of the purchase-price; and to secure K. until the deed and mortgage were discharged, McG. delivered the contract to K., who never returned it and failed to convey. McG. continued in possession, paying interest on the contract until May, 1825, when he died intestate, leaving the complainants, then infants of tender years, his only heirs-at-law. Shortly thereafter defendants took and have since retained possession. The answer set up various perfect defenses. The proofs were declared closed in April, 1888. No proceedings were thereafter taken in the suit, except in May, 1844, when there was a substitution of solicitors for complainant. All of the defendants in said suit died prior to November 6, 1881, about twenty years before the trial of this action.

P., then the owner, and then for the first time being advised that there was a question as to the title, made strenuous but ineffectual efforts to find the complainants in the chancery suit. It did not appear what had become of them; simply that they had not been heard of for many years, and were supposed to be dead. *Held*, that P., having purchased without actual notice of the chancery suit or the alleged claim of the complainants, acquired a perfect title, unless bound by the bill and the *lis pendens* therein; that defendant succeeded to all his rights, and a purchaser from him, although purchasing with knowledge of said claim, would acquire a perfect title; that, assuming all the allegations of the bill were true at its date, and that they were sufficient to have entitled the complainants, at the time the bill was filed, to a judgment requiring the then owner to receive the remainder of the purchase-price, and to convey the premises, yet, that the said complainants, if living, and, if dead, their successors in interest, were effectually barred at the time of the execution of the contract in question from reviving and continuing said suit; and that there was no defect in defendant's title justifying plaintiff in refusing to perform.

Id.

FRAUD.

1. The rule that where one who has purchased real estate, with full notice of an equitable claim of another thereto, transfers it to a *bona fide* purchaser, the latter not only takes a good title, but can transfer such a title to one who purchases with full knowledge of the fact, is subject to this exception, where the transfer is back to the original purchaser, who was guilty of constructive fraud in transferring the property; if it becomes revested in him, the original equity will re-attach to it in his hands. *Clark v. McNeal* 287
2. Where a number of persons and firms have conspired together, in

violation of the statutes (3 R. S. 692, § 8, sub. 6; Penal Code, § 168), to do acts injurious to trade, for instance, to unlawfully advance the price of an article of food, the courts will not intervene in favor of any one of the parties to give him redress for frauds perpetrated by another to his detriment in carrying out the unlawful enterprise. *Leonard v. Prole.* 871

8. It does not affect the question that the party complained of as guilty of the fraud was acting as agent for the others. All those who knowingly promote and participate in carrying out a criminal scheme are principals, and the fact that one acts, in some respects, in subordination to the others, does not render him less a principal. *Id.*

4. Where, therefore, a broker, who was one of the parties to an unlawful scheme to advance the price of lard, but who acted in carrying out the scheme simply as agent for the others, was proved to have defrauded his principals, *held*, that an action to compel him to account was not maintainable; that the courts would not aid in adjusting differences arising out of and requiring an investigation of the illegal transactions. *Id.*

5. In an action to recover damages for fraud in the sale or exchange of a lot of marble, the complaint alleged, and plaintiff's evidence tended to show, that he agreed to sell a hotel property for \$6,100 to defendant, who agreed to pay by assuming a mortgage of \$1,000 thereon, paying plaintiff \$1,100 in cash, and transferring to him a lot of marble which defendant represented to have cost him and to be of the market-value of \$3,000. It was further alleged that defendant colluded with one F. to appraise the marble at a fictitious value, and that F. did so. It was conceded on the trial that the actual cost and value of the marble did not exceed \$1,000. Defendant denied having made false statements as to the cost of the marble, and gave evidence which, if credited, would have justified a finding that both he and F. told

plaintiff the marble cost between \$800 and \$1,000, and gave evidence tending to disprove that a fixed price was agreed upon in the exchange for the plaintiff's property. Defendant then offered to prove that at the time of the sale the hotel property was not worth \$5,100, or anything like that sum. This was excluded on plaintiff's objection, and defendant excepted. *Held*, error; that the fact as to the agreement being in dispute, the real value of plaintiff's property was an element for the jury to consider in determining which version was correct. *Weidner v. Phillips.* 433

GRANTS.

— *As to authority of commissioners of land office to grant lands under the waters of navigable streams.*
See Rumsey v. N. Y. & N. E. R. R. Co. 428

GUARANTY.

1. Defendants executed to plaintiff an instrument in writing by which, for a valuable consideration, they agreed that F., who the instrument stated "has purchased, or is about to purchase," anthracite coal" of defendant, "shall pay said company at such time or times, and at such prices as may be agreed upon" between them, "for all coal that may be shipped to him up to the 1st day of May, 1882." In case of default of F. defendants agreed "to pay for the same, whether the indebtedness be in open account or embraced in notes, drafts or bills of exchange." In an action upon the instrument the defense was that plaintiff had extended the term of credit given to F., at the time coal was purchased, without the assent of defendants. *Held*, untenable; that the instrument was not made with reference to any then existing contract between F. and plaintiff fixing the time of credit, and it neither expressed or by implication limited the period of credit to the time fixed when a purchase was made, but left it

- subject to any future arrangement.
D., L. & W. R. R. Co. v. Burkard. 197
2. K., one of the defendants, was a married woman, not engaged in any business, and it did not appear that the instrument was executed for her benefit or for that of her separate estate. *Held*, that a nonsuit was properly directed as to her. *Id.*
3. Plaintiff offered to prove the terms of the first contract of sale made with F. after the execution of the instrument. The offer was rejected. *Held*, error. *Id.*

GUARDIAN AND WARD.

1. Where a general guardian of an infant brings an action in his own name as such guardian for an injury to his ward's estate, the question as to his "legal capacity" to maintain the action, if not taken by demurrer or answer, is waived. (Code of Civil Pro. § 499.) *Perkins v. Stimmel.* 859
2. An action at law cannot be maintained against the sureties upon the bond of a general guardian until proceedings for an accounting have been had against the guardian and his default established therein. *Id.*
3. The fact of the death of the guardian does not take the case out of the rule, as his personal representatives may be required to account (Code of Civil Pro. § 2606, as amended by Chap. 399, Laws of 1884), and before the sureties can be sued the proceedings on the accounting must at least establish the fact that none of the infant's property has come into the hands of the personal representatives. *Id.*
4. In the absence of a decree to that effect the presumption is that said representatives have possession of the infant's estate, and until it is otherwise established a devastavit will not be presumed. *Id.*

— *No equity exists in favor of a tenant who procures himself to be ap-*

pointed guardian of infants, claiming interest in demised lands, and thereupon denies title of his landlord.
See Cornell v. Hayden. 271

HIGHWAYS.

1. One having a right to a limited use of a street is required to so exercise his right as not to unnecessarily endanger travelers. *Francis v. N. Y. S. Co.* 380
2. Prior to 1877 defendant operated a horse car railroad on Third avenue in the city of B. By an ordinance of the common council of the city, pursuant to the act of 1878 (Chap. 432, Laws of 1878), it was authorized to run cars by steam motors between the city line on the south and Twenty-fourth street on the north. It did not stop its cars so propelled, however, at said street, but passed into and along it for some distance, backed them into Third avenue, and then in front of plaintiffs' premises, which are situated on the north-westerly corner of Third avenue and Twenty-fourth street, they were switched onto another track, making much noise, shaking plaintiffs' buildings, casting cinders, smoke and dust upon their premises, and interrupting the ordinary use of the street. In an action to recover damages. *held*, that plaintiffs, although not owners of the street, as abutting owners had such an easement therein as to enable them to insist, as against defendant, that it should be devoted only to the uses consistent with a public street; that the use of steam as a motive power in the manner stated was unlawful and in the nature of a nuisance, and plaintiffs were entitled to recover the damages sustained. *Hussner v. B'klyn C. R. R. Co.* 434

See COMMISSIONERS OF HIGHWAYS.

HUSBAND AND WIFE.

1. A mutual agreement between competent parties to take each

other for husband and wife constitutes a valid marriage, even if not in the presence of witnesses.
Gall v. Gall. 109

2. Such a marriage may be proved by showing actual cohabitation as husband and wife, acknowledgment, declarations, conduct, repute, reception among neighbors and relations, etc. *Id.*

3. Where it appears that the intercourse was illicit at first, but was not accompanied by any of the evidences of marriage, and subsequently it assumed a matrimonial character and was surrounded by the evidences of a valid marriage above named, a question of fact is presented for the determination of a jury. *Id.*

4. The provision of the Revised Statutes (2 R. S. 189, § 6) permitting a person already married to marry again, where the former husband or wife has absented himself or herself for five successive years without being known by such person to be living during that time, and declaring the second marriage to be void only from the time its nullity shall be pronounced by a court of competent jurisdiction, is based upon the probability that in such case the absentee is dead, and is designed to protect the person, who, in good faith, acts upon the statute. *Id.*

5. The mere fact that a wife has absented herself for five years, and that her husband has not heard from her in that time, does not justify him in marrying again; it must appear that he acted as a reasonable man desiring to act in good faith would have acted under the circumstances. *Id.*

6. Where, therefore, it appeared that a wife left her husband shortly after marriage, which occurred in 1865, and articles of separation were signed by them; that he never saw her afterward and believed the articles of separation were a divorce; that he heard she was dead in 1870; that he married again in 1871; that his former wife was living in 1873; that he never,

except on one occasion, inquired to ascertain where she was, although he continued to live in the same neighborhood with her relatives and was acquainted with some of them; that he told his second wife, both before and after he married her, that his former wife was living, but that he had a divorce from her, *held*, the evidence justified a conclusion that the man in marrying again did not act in good faith; and so that the second marriage was void. *Id.*

7. Where a court has received improper evidence in a civil action, under objection and exception, it may remedy the error by striking out the evidence of its own motion. *Id.*

See MARRIED WOMEN.

IMPRISONMENT.

1. *It seems* that where the affidavit annexed to a petition for his discharge presented by a person imprisoned upon execution, is not made on the day of the presentation of the petition, as required by the Code of Civil Procedure (§ 2204), but on a previous day, the court acquires no jurisdiction, and where an order of discharge granted thereon contains no recital of a compliance with this requirement, it is no protection to the sheriff; if, therefore, he obeys the order he renders himself liable for an escape. *Shaffer v. Risley.* 23

2. Where, however, the petition in such a case was duly served upon the attorney of the judgment-creditor and he, as such attorney, appeared on presentation of the petition and application for the order of discharge, without raising the objection, *held*, that this was a waiver thereof, and that it could not be raised thereafter in an action against the sheriff for an escape. *Id.*

INFANTS.

1. An action to compel the determination of a claim to real property

- is not maintainable against an infant. *Weiler v. Nemach.* 38 default in payment of rent under the original lease. *Otis v. Conway.* 13
2. The exception of infants and certain other classes of persons in the provision of the Code of Civil Procedure (§ 1688), authorizing such an action, is not repealed or affected by the provision (§ 1686), declaring that any action specified in the title containing it "may be maintained by or against an infant in his own name," etc. This provision does not give a right of action, but only provides that an action may be maintained by or against an infant where the right of action is given by other provisions of the title. *Id.*
3. The fact that a minor child was upon the platform of a street car in violation of a municipal ordinance, while it may be proved and is proper for the consideration of the jury in an action for negligence, does not necessarily establish negligence. *Connolly v. Knick.*
Ice Co. 104
4. The fact that all the heirs of a deceased plaintiff, in an action to compel a specific performance by the vendor of a contract for the sale of land, are infants is not a legal excuse for a failure on their part to perform the contract of their ancestor, and the *laches* which would have barred the action had he survived, will bar its prosecution by them. *Hayes v. Nourse.* 595

INSANE PERSONS.

1. Plaintiffs leased certain premises to S., who, thereafter, was adjudged a lunatic and a committee of his estate appointed. While proceedings were pending to compel the committee to pay rent, by agreement rent paid in by a sub-tenant of a portion of the premises was deposited to await the result of this action to determine who was entitled thereto. It appeared that the estate was insolvent. *Held,* that plaintiff was entitled to so much of the sum deposited as was paid for rent which accrued after

2. While said proceeding was pending the parties entered into stipulations, under and in pursuance of which a part of the premises was leased to different parties. Each of the stipulations recited that the tenant named therein might occupy "for the benefit of whom it may concern," and that the assent of the parties thereto should in no respect alter their legal position toward each other; all but one provided that payment of rent by check should be deposited, and at the determination of the controversy paid "to the party held to be in possession of the said premises." It was finally adjudged in said proceedings that the lunatic himself was in possession. *Held,* that defendant, as committee, was entitled, under the stipulation, to the rent so paid in and deposited. *Id.*
3. The other stipulation provided that the rent should be deposited "and finally paid over to the party ultimately entitled thereto." *Held,* that this referred to the final determination of the pending proceeding, and that the lunatic and his estate were entitled thereto. *Id.*

INSOLVENCY.

See ASSIGNMENT (FOR BENEFIT OF CREDITORS).

INSOLVENT CORPORATIONS.

— When transfer by insolvent state bank void under act of 1882 (§§ 186, 187, chap. 409, Laws of 1882).
See Atkinson v. R. P. Co. 168

INSOLVENT DEBTOR.

1. It seems that where the affidavit annexed to a petition for his discharge presented by a person imprisoned upon execution, is not

made on the day of the presentation of the petition, as required by the Code of Civil Procedure (§ 2204), but on a previous day, the court acquires no jurisdiction, and where an order of discharge granted thereon contains no recital of a compliance with this requirement, it is no protection to the sheriff; if, therefore, he obeys the order he renders himself liable for an escape. *Shafer v. Rizley*. 23

2. Where, however, the petition in such a case was duly served upon the attorney of the judgment-creditor and he, as such attorney, appeared on presentation of the petition and application for the order of discharge, without raising the objection, held, that this was a waiver thereof, and that it could not be raised thereafter in an action against the sheriff for an escape. *Id.*

INSURANCE (FIRE).

1. Written application for fire insurance was made by a broker on behalf of plaintiff to defendant's agents. The agents orally agreed to insure from the date of the application provided the company was not already "on the risk." The premium was not paid, but in an action upon the alleged contract of insurance it appeared that it was the custom to extend credit to the broker for the premium to the end of the month. Held, that there was a complete and valid contract binding from the date of the conversation. *Ruggles v. Am. C. Ins. Co.* 415

2. The authority of the agents was contained in two letters, one from defendant's general agent, the other from its secretary, both mailed before the making of the contract, but not received by the agents until after the fire. Held, the authority dated from the mailing of the letters. *Id.*

3. The letter from the general agent contained this statement: "Please do not undertake to write any specials for us at present." The secretary's letter stated that "a

commission of authority, as agents of this company in the city of Brooklyn," had been forwarded to the agents, adding, "We deem it unnecessary to enter into any detailed instructions as to the conduct of our business at your agency," giving as a reason that the general agent had written on the subject. The risk in question was a special one. Held, that the authority given by defendant was that of general agents, and did not exclude the taking of special risks; that the reference to "detailed instructions" did not limit the agent's power; that it referred to the manner of conducting the business, not to the authority to be exercised by the agent. *Id.*

INSURANCE (MARINE).

1. In an action upon a time policy of marine insurance upon a canal-boat, issued July 5, 1888, which expressly excepted "perils and losses from rotteness, inherent defects and other unseaworthiness," it appeared that the boat was repaired on August twenty-eighth, and was then in good seaworthy condition. There was no proof as to its condition after that time. It was employed in transporting coal. It left port loaded with coal on October nineteenth, and the next morning, in fair weather and smooth water, while being towed by a steam tug, suddenly sprung a leak and immediately sunk. The boat was old and subjected to heavy strains, and one of plaintiffs' witnesses testified that it might be strained in loading or unloading, and that one heavy cargo might render it unseaworthy. Held, that plaintiffs were properly nonsuited; that it was at least incumbent upon them to show that the boat was seaworthy when she left upon her last trip. *Berwind v. Greenwich Ins. Co.* 231
2. It seems that, where it appears that a vessel, shortly after sailing, becomes leaky and sinks without encountering any peril or storm, this is presumptive evidence of unseaworthiness. *Id.*

INTEREST.

1. In an action to recover unliquidated damages for breach of contract, unless the means are accessible to the party sought to be charged of ascertaining, by computation or otherwise, the amount to which plaintiff is entitled, he may not be allowed interest on the amount of damages found, and the submission of the question as to such allowance to the jury is error. *Mansfield v. N. Y. C. & H. R. R. Co.* 381

2. The question whether interest is recoverable in actions on contract does not rest in the discretion of a jury, but is one of law for the court. *Id.*

JOINT ADVENTURE.

It was agreed between the parties that plaintiff should subscribe on joint account for a certain amount of railroad bonds offered for sale by a construction company, plaintiff to advance the money to pay the installments and to carry the subscription until disposed of for their joint benefit. By the terms of the subscription ten per cent of the subscription price was to be paid down and the balance in installments as called for. In case of default in payment of any installment the company had the option to forfeit the subscription and all installments previously paid. Plaintiff paid the ten per cent down, but the bonds having declined in the market refused to pay subsequent installments, and the parties agreed to let the company exercise its option, which it did. In an action to recover one-half of the installment paid, held, that defendant was not bound to agree to the forfeiture and could have advanced the money and paid the calls, but having decided not to do so and the forfeiture having been declared with his concurrence, he was liable to pay his share of the loss. *Musgrave v. Buckley.* 506

JUDGES.

The provision of the Code of Civil

Procedure (§ 46), providing that a judge shall not sit as such or take any part in the decision of a cause or matter if he is related to any party to the controversy within the sixth degree, refers to a judge, justice or other person holding a court *ex nomine*; it has no application to assessors. *O'Reilly v. City of Kingston.* 439

JUDGMENT.

1. The relator, a patrolman of the police force of the city of New York, was arrested by his superior officer on June 18, 1879, on a charge of felony, and was imprisoned until January 17, 1880, when he was acquitted on trial. On that day he reported for duty. On January twenty-four he was dismissed from the force. In proceedings by *mandamus* to compel payment of his salary from the time of his arrest to that of his dismissal, the trial court gave a money judgment against the defendant. Held, error. *People ex rel. v. Board Police Comrs., N. Y.* 245

2. The complaint in an action, demanded judgment for \$7,000 and interest. The defendant did not appear. The complaint was amended *ex parte* at Special Term so as to demand judgment for \$13,618.66, with interest. Judgment was thereafter entered for that amount. Held, that, conceding H. was entitled to notice of the motion to amend the complaint, the failure to give it was an irregularity merely which could be corrected on motion, but would not operate to render the judgment void; that the judgment would stand as valid until set aside or amended. *Carr v. Sterling.* 558

JUDICIAL SALES.

1. A sale made by a duly appointed receiver of a state bank, pursuant to and upon terms expressed in an order of the Supreme Court, of a judgment, part of the assets of the bank, is a judicial sale, and the court may compel, by order, a

- specific performance of the contract of sale. *In re Denison.* 621
- 2 A confirmation of the contract of sale is not a requisite to its consummation, and it is not material whether the sale was public or private. *Id.*
- adopting plans for the improvement of the street the common council acted judicially, and in the exercise of the discretionary power vested in it, and for such acts an action would not lie; also, that the action could not be sustained upon the theory of negligent or unskillful construction of the wall. *Watson v. City of Kingston.* 88

JURISDICTION.

It seems that where the affidavit annexed to a petition for his discharge presented by a person imprisoned upon execution, is not made on the day of the presentation of the petition, as required by the Code of Civil Procedure (§ 2204), but on a previous day, the court acquires no jurisdiction, and where an order of discharge granted thereon contains no recital of a compliance with this requirement, it is no protection to the sheriff; if, therefore, he obeys the order he renders himself liable for an escape. *Shaffer v. Rieley.* 23

KINGSTON (CITY OF).

1. In pursuance of ordinances duly passed by defendant's common council establishing the grade of one of its streets, which was cut along the side of a hill, and directing the manner of construction, a dry wall was laid to carry the street up to grade in front of the premises of E., plaintiff's intestate, which were on the lower side of the street. By such ordinances the owner of abutting property was given the privilege of constructing a wall of masonry, but E. refused to avail herself of this permission or to pay for cement in which to lay the wall. Subsequently water came down the gutter on the lower side of the street and passed through the gutter and wall onto said premises, causing damage. In an action to recover therefor, it did not appear that said premises were subjected to any further burden in reference to surface-water than they were required to bear when in their natural state, held, that defendant was not liable; that in establishing the grade and
2. The ordinances required the sidewalks, curbs and gutters to be constructed by the abutting owners or occupants. E. constructed the gutter in front of her premises, using cobble-stones, instead of flat stone, as contemplated by the ordinance, and the water flowed through between the cobble-stones and thence through the wall. Held, that, in the absence of proof establishing that defendant's officers or agents had interfered with the gutter after it was laid, E., not the defendant, was responsible for the improper construction of the gutter. *Id.*
3. In an action to set aside, as illegal and void, an assessment upon lands of plaintiff for paving a street in the city of K., it appeared that by an ordinance of the common council, passed at the same time with the one authorizing the improvement, the grade of the street was declared to be "changed and amended." The city charter (Chap. 150, Laws of 1872, as amended by chap. 429, Laws of 1875), prohibits a change in the grade of a street except upon petition of a majority of the owners of the lineal feet frontage on that part of the street to be graded. No such petition was presented. There was no record of any previously established grade of the street. It appeared that some attempt had been made to establish a grade and to conform the street to it; but that the surface of the street was very irregular, there being low places in which the water would stand, and one side in some places lower than the other side, and the grade was not uniform. When the street was paved it was filled in places. Under the contract for the work the change in the actual surface of the street did not

increase the expense, no charge being made for the filling, and the assessment was simply for the paving. The trial court was requested to find, as a fact, that the change of grade did not increase the cost or the assessment on plaintiff's lot; the request was declined as "immaterial." *Held*, error; that it devolved upon plaintiff to show that she was damaged by the assessment made; also, that a material change in the grade had been effected by the ordinance, the expense of which entered into the assessment; that the conforming of the road-bed necessarily required some grading, but did not necessarily effect a change of the established grade; and that the evidence showed there was no change which increased plaintiff's assessment. *O'Reilley v. City of Kingston.* 439

4. The apportionment it appeared was made in proportion to the frontage of each lot upon the street; some of the lots were vacant, others occupied by valuable buildings. *Held*, that, as under the charter, it was the duty of the assessors to determine the benefits derived by the owners, in thus determining they acted judicially, and their judgment as to the amount of benefit derived could not be reviewed here unless they acted upon an erroneous principle in making the assessment; that the assessment on each lot, in accordance with the number of feet front, was not necessarily an erroneous principle, if in the judgment of the assessors the owners were benefited in that proportion. *Id.*

5. There was a street railway whose tracks were, before the improvement, in, but along the side of the street. The railroad company agreed with the city to and did remove its tracks to the center and paved the street between its rails. The charter provides that no part of the expense of such an improvement shall be assessed on lands "not bordering on or touching the street." It was objected that the railroad company should have been assessed. *Held*, untenable; that the land occupied by it did not border on or touch the street within

the meaning of the charter, it being simply a part thereof. *Id.*

6. Said charter provides that the assessment shall be upon the "owners or occupants and upon the land deemed to be benefited;" also, that if an assessor is interested in property liable to be affected by such an assessment, the common council may appoint a freeholder to act in his place. It appeared that the son of one of the assessors owned one of the lots assessed. Upon it is a hotel and the assessor lived there. It did not appear that the son lived on the premises, or who ran the hotel. It was claimed that the assessment was void because said assessor was interested. *Held*, untenable; that the evidence failed to show that the assessor was an "occupant" within the meaning of the charter, or that he was interested in the property assessed. *Id.*
7. The latter alleged defect was not set forth in the complaint. It was proved by evidence *de hors* the record, under objection by defendant's counsel. *Held*, that the evidence was improperly received; and that the question, therefore, was not properly presented on appeal. *Id.*

LACHES.

1. In an action upon an undertaking given to secure the release of one H. from an order of arrest, issued in a civil action, it appeared that execution against the body of H. was not issued until a year and a half after the return unsatisfied of the execution against his property. H. could not then be found. He had remained in the vicinity for a long time after entry of the judgment. It appeared, however, that defendant had requested plaintiff's attorney not to press or pursue H. in the matter, and he swore that this was the reason for the delay in issuing the body execution. *Held*, that any laches on the part of plaintiff was excused. *Carr v. Sterling.* 558
2. The fact that all the heirs of a

deceased plaintiff, in an action to compel a specific performance by the vendor of a contract for the sale of land, are infants is not a legal excuse for a failure on their part to perform the contract of their ancestor, and the *laches* which would have barred the action had he survived, will bar its prosecution by them. *Hayes v. Nourse.* 595

3. The right of the plaintiff in such an action to revive and continue it against the successors in interest of a deceased defendant may be lost by long delay in making the application, especially if the successors are purchasers in good faith, and if the condition and value of the property have greatly changed, and the only witnesses by whom the facts in issue could have been established are dead. *Id.*

LANDLORD AND TENANT.

1. The creditors of an insolvent lessee have no equitable claim to the profits issuing from leased land until after the landlord's claim for rent is satisfied. *Otis v. Conway.* 13
2. Plaintiffs leased certain premises to S., who, thereafter was adjudged a lunatic and a committee of his estate appointed. While proceedings were pending to compel the committee to pay rent, by agreement rent paid in by a sub-tenant of a portion of the premises was deposited to await the result of this action to determine who was entitled thereto. It appeared that the estate was insolvent. *Held*, that plaintiff was entitled to so much of the sum deposited as was paid for rent which accrued after default in payment of rent under the original lease. *Id.*

3. While said proceeding was pending the parties entered into stipulations, under and in pursuance of which a part of the premises was leased to different parties. Each of the stipulations recited that the tenant named therein might occupy "for the benefit of whom it may concern," and that the assent of the parties thereto should in no

respect alter their legal position toward each other; all but one provided that payment of rent by check should be deposited, and at the determination of the controversy paid "to the party held to be in possession of the said premises." It was finally adjudged in said proceedings that the lunatic himself was in possession. *Held*, that defendant, as committee, was entitled, under the stipulation, to the rent so paid in and deposited. *Id.*

4. The other stipulation provided that the rent should be deposited "and finally paid over to the party ultimately entitled thereto." *Held*, that this referred to the final determination of the pending proceeding, and that the lunatic and his estate were entitled thereto. *Id.*

5. Where damages are claimed solely because of the failure of a lessor to give the lessee possession of the demised premises, its measure is the excess of the rental value over the rent reserved in the lease. *Dodds v. Hakes.* 260

6. A lessee in possession is estopped from contesting with his lessor the validity of the contract under which he has acquired possession. *Mayo, etc. v. Huntington.* 631

— *No equity exists in favor of tenant who procures himself to be appointed guardian of infants claiming interest in demised lands, and thereupon denies title of his landlord.*
See Cornell v. Hayden. 271

LEASE.

See LANDLORD AND TENANT.

LIEN.

1. After the assignment of a mortgage, which was not recorded, the mortgagee, at the request of the owner of the equity of redemption and without the knowledge or consent of the assignee, caused the same to be canceled of record.

Said owner then executed another mortgage on the premises to mortgagees who had full notice of the facts; they assigned the same to *bona fide* purchasers who foreclosed the mortgage, and on the foreclosure sale the premises were purchased by the mortgagees in the name of an agent or representative who conveyed the same to a person having full knowledge of the equities of the holder of the original mortgage. In an action to foreclose said mortgage, *held*, that it was a lien prior to the interest of said subsequent mortgagees or the grantee of their agent; that while, upon transfer of the subsequent mortgage to *bona fide* purchasers, it became in their hands a lien prior to that of plaintiff's mortgage, owing to the protection afforded by the recording act, upon purchase of the premises by one acting for the mortgagees, plaintiff's equity at once reattached. *Clark v. McNeal.* 287

2. A pending action, brought to establish title to or a lien upon land, does not of itself, nor does a duly recorded notice of its pendency, make the title defective or create a lien on the land. *Hayes v. Nourse.* 595

See MECHANIC'S LIEN.

MANDAMUS.

1. The relator, a patrolman of the police force of the city of New York, was arrested by his superior officer on June 13, 1879, on a charge of felony, and was imprisoned until January 17, 1880, when he was acquitted on trial. On that day he reported for duty. On January twenty-four he was dismissed from the force. In proceedings by *mandamus* to compel payment of his salary from the time of his arrest to that of his dismissal, the trial court gave a money judgment against the defendant. *Held, error. People ex rel. v. Police Comrs.* 245

2. In proceedings by *mandamus*,

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instituted by a commissioner of highways, to compel the board of town auditors to audit certain claims against the town for costs awarded against the relator and paid by him in actions brought by him as such commissioner, and for moneys expended by him in that capacity, it was admitted that the claims had been presented to former boards and rejected by them on the ground that the town was not legally liable to pay them. *Held,* that the former adjudications were conclusive, and that until reversal they formed a bar to a reauditing of the bills and to the application for a *mandamus* to compel it. *People ex rel. v. Barnes.* 817

3. In determining as to the liability of the town the board acts judicially, and its action cannot be reviewed or controlled by the courts through a writ of *mandamus*. *Id.*

MARRIAGE.

1. A mutual agreement between competent parties to take each other for husband and wife constitutes a valid marriage, even if not in the presence of witnesses. *Gall v. Gall.* 109
2. Such a marriage may be proved by showing actual cohabitation as husband and wife, acknowledgment, declarations, conduct, repute, reception among neighbors and relations, etc. *Id.*
3. Where it appears that the intercourse was illicit at first, but was not accompanied by any of the evidences of marriage, and subsequently it assumed a matrimonial character and was surrounded by the evidences of a valid marriage above named, a question of fact is presented for the determination of a jury. *Id.*
4. The provisions of the Revised Statutes (2 R. S. 189, § 6) permitting a person already married to marry again, where the former husband or wife has absented him.

self or herself for five successive years without being known by such person to be living during that time, and declaring the second marriage to be void only from the time its nullity shall be pronounced by a court of competent jurisdiction, is based upon the probability that in such case the absentee is dead, and is designed to protect the person who, in good faith, acts upon the statute. *Id.*

5. The mere fact that a wife has absented herself for five years, and that her husband has not heard from her in that time, does not justify him in marrying again; it must appear that he acted as a reasonable man desiring to act in good faith would have acted under the circumstances. *Id.*

6. Where, therefore, it appeared that a wife left her husband shortly after marriage, which occurred in 1865, and articles of separation were signed by them; that he never saw her afterward and believed the articles of separation were a divorce; that he heard she was dead in 1870; that he married again in 1871; that his former wife was living in 1873; that he never, except on one occasion, inquired to ascertain where she was, although he continued to live in the same neighborhood with her relatives and was acquainted with some of them; that he told his second wife, both before and after he married her, that his former wife was living, but that he had a divorce from her, *held*, the evidence justified a conclusion that the man in marrying again did not act in good faith; and so that the second marriage was void. *Id.*

MARRIED WOMEN.

1. Defendants executed to plaintiff an instrument in writing by which, for a valuable consideration, they agreed that F., who the instrument stated "has purchased, or is about to purchase, anthracite coal" of defendant, "shall pay said company at such time or times, and at such prices as may be

agreed upon" between them, "for all coal that may be shipped to him up to the 1st day of May, 1882." In case of default of F., defendants agreed "to pay for the same, whether the indebtedness be in open account or embraced in notes, drafts or bills of exchange." In an action upon the instrument it appeared that K., one of the defendants, was a married woman, not engaged in any business, and it did not appear that the instrument was executed for her benefit or for that of her separate estate. *Held*, that a nonsuit was properly directed as to her. *D., L. & W. R. R. Co. v. Burkard.* 197

2. In an action to recover for a quantity of meat alleged to have been sold between April, 1878, and April, 1880, to defendant, a married woman, the owner of a hotel, which it was alleged she carried on on her sole and separate account, it did not appear that she ever personally contracted with plaintiff for the meat, or in any manner induced him to deliver it or ever promised to pay for it; on the contrary, it appeared that plaintiff's negotiations were with defendant's husband, who did not pretend to be acting as agent, but held himself out to the public as the proprietor of the business. It was proved that defendant owned the property, which fact plaintiff knew; that she resided there with her husband and four children, and did such work about the hotel as is customary for the wife of a hotel proprietor, and that she did not lease the hotel to her husband; also, that the business cards of the house were signed by the husband as proprietor, and he assigned the guests their rooms, purchased all supplies, employed the servants, received the money due from guests and disbursed it as he saw fit. There was no evidence that defendant ever attempted to interfere with or control her husband's management of the hotel, or ever authorized him to act for her, or that she pretended at any time to be carrying on a separate business, or that any credit was ever obtained by her husband in her name or ostensibly on her account. *Held*,

that plaintiff was not entitled to recover; that to maintain the action it was necessary for plaintiff to show that defendant was carrying on the business on her own account and for her own benefit, and that her husband acted simply as her agent. *Dickerson v. Rogers.*

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3. It seems that, prior to the passage of the enabling act of 1884 (Chap. 380, Laws of 1884), a married woman could only contract in cases where authority was expressly conferred by statute. She could bind herself: *First.* Where the obligation was created in or about carrying on her trade or business. *Second.* Where the contract related to or was made for the benefit of her separate estate. *Third.* Where the intention to charge her separate estate was expressed in the instrument or contract by which the liability was created. *Fourth.* Where the debt was created for the property purchased by her. The contract could be express or implied and made personally or by agent, and she could authorize her husband to act as such agent, and upon contracts thus made and debts thus created her separate estate would be chargeable. *Id.*

See HUSBAND AND WIFE.

MARSHALING ASSETS.

1. Plaintiffs leased certain premises to S., who, thereafter, was adjudged a lunatic, and a committee of his estate appointed. While proceedings were pending to compel the committee to pay rent, by agreement rent paid in by a subtenant of a portion of the premises was deposited to await the result of this action to determine who was entitled thereto. It appeared that the estate was insolvent. *Held,* that plaintiff was entitled to so much of the sum deposited as was paid for rent which accrued after default in payment of rent under the original lease. *Otis v. Conway.*

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2. The facts stated in a case sub-

mitted under the Code of Civil Procedure (§1279) were substantially these: The firm of M.'s Sons, were the financial agents of the plaintiff. H., one of said firm, was also plaintiff's treasurer. The firm kept the transfer book, paid all dividends to plaintiff's stockholders and frequently was in advance to it, but neither charged nor allowed interest, and on plaintiff's books the account was kept in the name of the firm; it kept no account in the name of H. as treasurer. Remittances made by plaintiff were at one time made to the order of H., but at his request they were thereafter made direct to the order of the firm. Plaintiff's annual printed reports stated its funds were in the hands of the firm; there was no statement showing funds in the hands of the treasurer. The firm failed and made an assignment for the benefit of creditors without preferences. The members of the firm also made assignments of their individual estates. At this time the firm books showed an indebtedness to plaintiff of \$94,000. The firm assets were not sufficient to pay its debts. The individual estate of H. would pay his individual indebtedness, including the balance due plaintiff, if that should be decided to be an individual, not a firm indebtedness. *Held,* that the statement failed to show a receipt by H., as treasurer, of the moneys in controversy, but the indebtedness appeared to be simply that of the firm; and that plaintiff was only entitled to share with other firm creditors in the surplus of the individual assets of H. after payment of his individual indebtedness. *N. Y., Prov. & B. R. R. Co. v. Dixon.*

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MASTER AND SERVANT.

1. In an action to recover damages for injuries alleged to have been caused by defendants' negligence these facts appeared: Plaintiff was employed as shoveler in defendants' sugar refinery, upon the second floor of which there are bins for the refined sugar. In the

bottom of each bin is an orifice about two feet square, through which the sugar falls into a packer. It is the duty of the shovelers, among other things, when the discharging orifice of a bin becomes clogged, to open it by running a pole down through and loosening the sugar. Plaintiff had been engaged in this work, and was acquainted with the construction of the bins and the method of discharging sugar. The orifice of a bin became clogged and plaintiff entered with a co-employee to open it. The pole not being long enough to effect the purpose, they dug down into the sugar far enough to reach the orifice with the pole. On opening it a sudden and unusual subsidence of the sugar occurred and plaintiff was drawn down and surrounded by sugar; his co-employees threw a rope around his body and pulled him out, whereby he received the injuries complained of. It was clearly proved that the bins had long been in use, and no witness was called to show that they were defectively constructed, out of repair, or that they might have been improved. The only evidence to show defendants' knowledge of the danger was that of a former employee who testified that it was necessary in working to go on to the sugar, and that it was liable to run in upon a person thus employed; that it happened twice to him, once the foreman being present. The questions of defendants' negligence and plaintiff's contributory negligence were submitted to the jury, who found for the defendants. *Held*, no error for which plaintiff could complain. *Bohn v. Havemeyer.* 296

2. *It seems* the evidence was insufficient to justify the submission of the question of defendants' negligence to the jury. *Id.*

3. Plaintiff, a switchman employed in defendant's yard at E., while engaged in coupling cars stepped into a cattle-guard and was injured. In an action to recover damages, it appeared that the cattle-guard was near scales where defendant weighed its cars, and the cars, when pushed from the scales passed

over it; it had been there for several years, and no injury, so far as appeared, had resulted from it. Plaintiff had been in defendant's employ three days. The accident happened in the evening. Plaintiff had a lighted lantern and was directed to couple a car just pushed from the scales with one that had preceded it; the ends of the two cars which he sought to couple were over the cattle-guard; he stepped into it and the injury resulted. Plaintiff's duties had not previously called him to the place in question. *Held*, the fact that the location of the cattle-guard was at a place where cars, when weighed, were habitually coupled, imposed upon defendant the duty to use care to make that place reasonably safe for its employees; and the evidence authorized a finding that defendant, in permitting the cattle-guard to remain in that place in the condition it was, failed to perform its duty to its employees, and so was chargeable with negligence; also, that the evidence justified a finding that plaintiff had no knowledge of the cattle-guard, and was not guilty of negligence in failing to observe it. *Fredenburg v. N. C. R. Co.* 583

MECHANIC'S LIEN.

1. Defendant V. entered into a contract with the city of Y. for improving one of its streets; the contract made it the duty of the city engineer to report to the common council in case the contractor should refuse or neglect to supply a sufficiency of skilled workmen or proper materials, or should fail in any respect to prosecute the work with promptness and diligence, or omit to fulfill any provision of the contract, and the common council were authorized, if satisfied of the correctness of such a report, to declare the contract forfeited, to employ other persons to finish the work "according to the plans and specifications;" and to deduct the expenses from any sum due the contractor. While the contractor was engaged in performance the engineer reported

that the time for the completion of the contract had "long since expired" and that the contractor had neglected to perform it in other respects. Pursuant to resolution of the common council notice was given the contractor that unless the work was prosecuted with diligence and promptness the city would consider the contract violated and forfeited, and that other persons would be employed to finish the work and the expense charged against the contractor; and, thereafter, that body adopted a resolution that the contract was broken and forfeited and the work was completed by the city. Some of the work done by the contractor, which was imperfect, was taken down and rebuilt. No notice had been given by the city to the contractor to take down and rebuild or otherwise change any of the work he had done. In an action to foreclose a mechanic's lien upon the money's unpaid the city claimed to set-off the amount expended in completing the contract. The trial court excluded evidence of the cost of taking down and rebuilding the imperfect work, holding that the city having declared the contract forfeited on one ground could not thereafter allege other grounds, and that it was not authorized to take down and rebuild any work until the engineer had made a report that the contractor had neglected or refused to take down and properly replace such work. *Held*, error; that the forfeiture contemplated by the contract applied only to the contractor; and that upon forfeiture the city had the right to go on and complete the contract, not simply remedying the defects pointed out in the report, but in all other respects wherein the work was not completed according to the terms of the contract; that it was not requisite to specify in the resolution all the grounds of forfeiture, but it was sufficient to specify one tenable ground. *Powers v. City of Yonkers.* 145

2. Several other lienors who were made defendants, and the amount of whose respective liens was less than \$500, claimed that as against

them no appeal to this court could be taken from the judgment. *Held*, that the "amount in controversy," within the meaning of the provision of the Code of Civil Procedure limiting appeals to this court (§ 191, sub. 3), was the amount due the contractor; and, as this exceeded \$500, that the judgment was appealable. *Id.*

MEMORANDA.

In an action to recover for services and expenses, plaintiff was permitted to put in evidence a book of memoranda made by him; this was objected to generally. *Held*, that as the memoranda might have been made competent by plaintiff's testimony verifying the entries as original and correct, and showing he was unable to recollect the items independent of the memoranda, the general objection was not well taken. *Wilson v. King & Co. El. R. R. Co.* 487

MILK.

See DAIRY COMMISSIONER.

MISTAKE.

In an action upon an undertaking alleged to have been given to secure the release of one H. from an order of arrest issued in a civil action brought in the Superior Court of the city of New York, the complaint alleged that the undertaking was executed and accepted under an agreement that, upon its execution, H. should be discharged from arrest, defendant agreeing to fully perform and abide by its terms. Said undertaking was entitled in the Supreme Court, and did not conform to the provision of the Code of Civil Procedure (§ 575), and plaintiff claimed to recover upon it, not as a statutory undertaking, but as an agreement valid at common law. *Held*, that, treating the undertaking as an agreement, the mistake

in the entitling was not available; that no particular form was necessary, nor was it necessary that it should be entitled, and so the words "Supreme Court" might be treated as surplusage; and that this action was maintainable. *Carr v. Sterling.* 558

MORTGAGE.

*See CHATTTEL MORTGAGE.
FORECLOSURE.*

MOTIONS AND ORDERS.

1. In an action to determine conflicting claims of licensor to personal property, orders were granted in the action appointing a receiver and directing him to sell the property and confirming his report of sale. *Held*, that these orders being proper to the action and resting in the discretion of the court, were not reviewable here. *Ostrander v. Weber.* 96

2. The record on appeal in an equity action showed that the action was brought to trial at a circuit before a jury; that at the close of the evidence defendant's counsel moved to dismiss the complaint and plaintiff asked to go to the jury upon certain questions of fact. Plaintiff's motion was denied, the complaint dismissed and exceptions ordered to be heard in the first instance at General Term. At General Term an order was entered overruling the exceptions and denying plaintiff's motion for a new trial, and a judgment was then entered which recited the trial, the direction for the dismissal of the complaint, the exceptions thereto, the order that they be heard in the first instance at General Term, the motion for a new trial and the decision of the General Term thereon, and adjudged that the complaint be dismissed with costs and disbursements. Plaintiff appealed to this court, stating in his notice of appeal that he intended to bring up for review the order of the General Term

denying the motion for a new trial. *Held*, that the record presented no question for review upon the merits; that, regarding the proceeding as a trial by the court, no decision was made as required by the Code of Civil Procedure; that there was no authority to direct exceptions in a case triable by the court to be heard in the first instance at the General Term, that proceeding being limited to a case triable by a jury. (§ 1000.) *MacNaughton v. Osgood.* 574

3. A motion for a new trial, except in the cases specified in sections 999, 1000 and 1001 of said Code, must, in the first instance, be made at Special Term. *Id.*

See APPEAL.

MUNICIPAL CORPORATIONS.

*See BROOKLYN (CITY OF).
KINGSTON (CITY OF).
NEW YORK (CITY OF).
YONKERS (CITY OF).*

NAVIGATION.

1. The provision of the Revised Statutes (1 R. S. 208, § 67), prohibiting the commissioners of the land office from making grants of land under the waters of navigable streams "to any person other than the proprietor of the adjacent lands," has reference to proprietors of the adjacent uplands. *Rumsey v. N. Y. & N. E. R. R. Co.* 423

2. A railroad company that has acquired title to land under water some distance from the shore for the purpose of constructing its road-bed, and has built thereon an embankment supporting its tracks, leaving a bay between the embankment and the original shore line into which the tide ebbs and flows, is not a "proprietor of adjacent lands" within the meaning of said provision, and the owner of the upland adjoining the original shore, not the railroad corporation, is entitled to the grant. *Id.*

3. *It seems* the provision of the General Railroad Act of 1850 (§§ 25-49, chap. 140, Laws of 1850), empowering said commissioners to make grants of state lands to railroad corporations, includes a power to grant to such a corporation lands under water for the erection of docks necessary to the transaction of its business. *Id.*
4. It was the intent of the legislature, in the passage of the act of 1848 creating the H. R. R. R. Co., and authorizing the construction of its road along the east shore of the Hudson river (Chap. 216, Laws of 1848), to protect the upland owners along said shore in their access to the waters of the river, and to maintain their rights in the river unimpaired by the construction of the railroad (§§ 15, 16), and it did not change the policy of the state with reference to the promotion of commerce on the river, or deprive the said commissioners of the power to make grants of land under water to the owner of the uplands. *Id.*
5. Plaintiffs are the owners of certain uplands bordering upon the easterly shore of the Hudson river. In 1848 their predecessors in title deeded to the H. R. R. R. Co. a strip of land, partly above high-water mark and partly under the water of the river, retaining, however, a large part of the original shore line. Upon said strip the railroad company constructed an embankment several feet above high-water mark for their road-bed, which embankment is between plaintiffs' uplands and the channel of the river, but a considerable distance outside of the original shore line. A culvert or opening was built in the embankment, through which the waters flowed into the bay, between it and the said shore line. In 1868 said company obtained from the commissioners of the land office a grant of the land under water covered by its road-way, and extending westward into the river 200 feet. In 1885 said commissioners executed to plaintiffs a grant of land under water extending along the whole water front of their uplands, and westward into the river a considerable distance beyond the said company's road, the grant expressly excepting and reserving the rights of said company. In 1881 defendant built a portion of its road in the waters of the river, in front of plaintiff's uplands, west of the H. R. R. R. Co.'s road; partly on the land so granted to said company and partly outside, but within the lines of plaintiffs' grant. *Held*, that the grant to the plaintiffs was valid, and that an action was maintainable to restrain defendant from operating its road over and upon the lands so granted. *Id.*

NEGLIGENCE.

1. Plaintiff was in the employ of defendant, engaged in working a press used in stamping tin plates for roofing. The press had two dies, between which the plates were placed. While so engaged plaintiff's hand was caught and crushed between the dies. In an action to recover damages for the injury plaintiff claimed, and his evidence tended to show, that the press was out of repair, so that the clutch, which was designed to hold the upper die in place until the operative by the pressure of his foot on a treadle released it and let it down upon the tin plate on the lower die, would occasionally fly out of position letting the die down without pressure on the treadle, and that this happened at the time of the injury. It appeared by plaintiff's testimony that he had been operating this press for about a year; that three times before the accident the upper die had thus descended, the last time about an hour previous; also, that once before plaintiff's hand was caught between the dies and the thumb injured. A stick was provided for moving the plates between the dies, and a notice was posted upon the press forbidding employees "under any circumstances" from placing their hands or fingers under the press. Defendant's superintendent and foreman had both, on different occasions, reproved plaintiff for putting his fingers between the dies and warned him of the dan-

ger, but he was accustomed to disregard the rule, his excuse being that he could work faster with his fingers than with the stick. On the occasion of the accident the plate stuck to the lower die and he was using his fingers instead of the stick to remove it. *Held*, that plaintiff's negligence directly contributed to the injury, and a refusal to nonsuit was error. *Cullen v. N. S. M. R. Co.* 45

2. A draft drawn upon defendant was indorsed by the payee and mailed to the indorser; it never reached him, but fell into the hands of some person who presented and procured it to be certified by defendant; a memorandum showing the number and amount of the draft and that it was certified was entered upon a register kept by defendant of bills drawn upon it by the drawer of this one. The drawer notified defendant by letter of the miscarriage of the draft and not to pay it. Thereupon there was added to the memorandum the words, "stop pay; see letter." Subsequently the draft, which had been altered by raising the amount and changing the date and name of payee, was offered to plaintiffs in payment of certain bonds. In an action to recover the amount of the draft as raised, aside from proof of these facts, plaintiff's evidence was to the effect that they sent the draft to defendant's banking-house by a messenger, who presented it at the window of the paying-teller stating that plaintiffs wished to know whether the certification was good. The person in attendance, without referring to the register, answered "yes." Upon being advised of this plaintiffs received the draft in payment for the bonds. In an action to recover the amount of the draft as raised, *held*, that the evidence was sufficient to justify a finding of negligence on the part of defendant in failing to disclose the facts to plaintiff's messenger and to authorize a recovery. *Clews v. B'k of N. Y. N. B. Assn.* 70

3. In pursuance of ordinances duly

passed by defendant's common council, establishing the grade of one of its streets, which was cut along the side of a hill, and directing the manner of construction, a dry wall was laid to carry the street up to grade in front of the premises of E., plaintiff's intestate, which were on the lower side of the street. By such ordinances the owner of abutting property was given the privilege of constructing a wall of masonry, but E. refused to avail herself of this permission or to pay for cement in which to lay the wall. Subsequently water came down the gutter on the lower side of the street and passed through the gutter and wall onto said premises, causing damage. In an action to recover therefor, it did not appear that said premises were subjected to any further burden in reference to surface-water than they were required to bear when in their natural state, *held*, that defendant was not liable; that in establishing the grade and adopting plans for the improvement of the street the common council acted judicially, and in the exercise of the discretionary power vested in it, and for such acts an action would not lie; also, that the action could not be sustained upon the theory of negligent or unskillful construction of the wall. *Watson v. City of Kingston.* 88

4. The ordinances required the sidewalks, curbs and gutters to be constructed by the abutting owners or occupants. E. constructed the gutter in front of her premises, using cobble-stones instead of flat stone, as contemplated by the ordinance, and the water flowed through between the cobble-stones and thence through the wall. *Held*, that in the absence of proof establishing that defendant's officers or agents had interfered with the gutter after it was laid, E., not the defendant, was responsible for the improper construction of the gutter. *Id.*
5. The fact that a passenger on a street car stands upon the outer platform when there is opportunity to take a seat in the car, while it

- will ordinarily constitute a defense in an action against the railroad company, it is not a defense in an action against another party to recover damages for negligence causing injury to the passenger. *Connally v. Knick. Ice Co.* 104
6. The fact that a minor child was upon the platform of a street car in violation of a municipal ordinance, while it may be proved and is proper for the consideration of the jury in an action for negligence, does not necessarily establish negligence. *Id.*
7. In an action to recover damages for alleged negligence causing injury to plaintiff, a child seven years old, it appeared that at the request of the conductor of a street car plaintiff turned a switch to permit the car to turn onto another street and got upon the side platform of the car with a view of getting a penny from the conductor. As the car was on the curve turning onto the other street one of defendant's wagons, which was being driven at a rapid rate, struck the end of the car causing the injury complained of. Plaintiff did not see the wagon before the collision nor look to see if any wagon was coming. Defendant's evidence tended to show that, had the car kept straight on there would have been no collision, but that in turning, the rear end swung out into the line of the wagon wheels and that the driver of the wagon was not aware of the intention to turn the car into the other street until it was too late to avoid the collision. There was evidence, however, tending to show and justifying a finding that when the movement to turn the car was first made defendant's driver, in the exercise of reasonable care, could have slackened the speed of the wagon, and by doing so the collision would have been avoided. *Held*, that the question of plaintiff's negligence and of contributory negligence on the part of defendant was properly submitted to the jury. *Id.*
8. The omission of an owner of a building in the city of New York used for business purposes, in which there is a hoisting elevator, to comply with the requirements of the statute of 1874 (Chap. 547, Laws of 1874), requiring that the openings in each floor shall be protected by such a substantial railing and trap-doors to close the same as shall be approved by the superintendent of buildings, and that such trap-doors shall be closed at all times, except when in actual use, is *prima facie* evidence of negligence, in an action by one lawfully upon the premises who has sustained injury in consequence of a failure to comply with the statute. *McRichard v. Flint.* 222
9. The exercise of the duty imposed by the statute is not dependent upon the action of the superintendent of buildings. The owner may not properly delay compliance until he shall receive directions, but it is incumbent upon him to call upon the officer for directions and approval. *Id.*
10. In such an action it appeared that plaintiff went to the building to see one of the defendants. He was directed to another building in the rear; not finding the defendant there he returned to the building and seeing a folding door, one-half of which was partly open, entered. It was not the usual place of entry into the building. About nineteen inches from the door-sill was an open elevator hatchway, into which he fell and was injured. Plaintiff testified that he supposed this was the main entrance; that the hatchway was not within his view when he went on to the step before the door; that as he entered he saw the saddle of the door-sill and the floor, and supposed the latter was continuous; that he then raised his eyes and glanced into the sales-room through a glass partition; that he saw no elevator shafting, and that the door obscured the opening and he did not see it. *Held*, that the failure of plaintiff to stop and look around him when he entered did not, as matter of law, charge him with contributory negligence; and that the question as to such negli-

- gence was properly submitted to the jury. *Id.*
11. Also *held*, that, for the purpose of showing that drawings or diagrams of the buildings presented by defendants on the trial did not correctly show the situation at the time of the accident, it was competent for plaintiff to prove that changes had been made since that time. *Id.*
12. In an action to recover damages for injuries alleged to have been caused by defendants' negligence these facts appeared: Plaintiff was employed as shoveler in defendants' sugar refinery, upon the second floor of which there are bins for the refined sugar. In the bottom of each bin is an orifice about two feet square, through which the sugar falls into a packer. It is the duty of the shoveler, among other things, when the discharging orifice of a bin becomes clogged, to open it by running a pole down through and loosening the sugar. Plaintiff had been engaged in this work, and was acquainted with the construction of the bins and the method of discharging sugar. The orifice of a bin became clogged and plaintiff entered with a co-employe to open it. The pole not being long enough to effect the purpose, they dug down into the sugar far enough to reach the orifice with the pole. On opening it a sudden and unusual subsidence of the sugar occurred and plaintiff was drawn down and surrounded by sugar; his co-employe threw a rope around his body and pulled him out, whereby he received the injuries complained of. It was clearly proved that the bins had long been in use, and no witness was called to show that they were defectively constructed, out of repair, or that they might have been improved. The only evidence to show defendants' knowledge of the danger was that of a former employe, who testified that it was necessary in working to go on to the sugar, and that it was liable to run in upon a person thus employed; that it happened twice to him, once the foreman being present. The question of defendants' negligence and plaintiff's contributory negligence were submitted to the jury, who found for the defendants. *Held*, no error for which plaintiff could complain. *Bohn v. Havemeyer.* 296
13. *It seems* the evidence was insufficient to justify the submission of the question of defendants' negligence to the jury. *Id.*
14. An elevator in a building, for the carriage of persons, is not supposed to be a place of danger, to be approached with great caution; on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen or make a special examination. *Tousey v. Roberts.* 312
15. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, these facts appeared: Plaintiff's husband leased of defendant an apartment in an apartment-house owned by him in the city of New York. The usual mode of going to and from said apartment was by an elevator operated by defendant for the accommodation of the occupants. The door through which the elevator car was entered on the ground floor was so constructed that it could be opened by a person standing in the hallway. Plaintiff entered the hallway from the street between 6 and 7 P. M.; there was no artificial light in the hallway; as she approached the elevator the door was thrown open by a boy who, plaintiff's witnesses testified, had frequently run the elevator. She stepped through the doorway and, as the car was above, she fell to the bottom of the shaft and was injured. *Held*, that a motion for a nonsuit was properly denied; and that the evidence justified a verdict for plaintiff. *Id.*
16. The court, after it had stated to the jury that there was no evidence that the boy was employed by defendant, charged that, although he was not a servant, it might be a question for them whether defendant should not have exercised such

supervision over the building as to make it impossible for the boy to do acts from which the tenant might have derived the impression that he was such a servant. *Held,*
no error. *Id.*

17. Defendant lawfully opened a trench in a city street parallel with the track of a street railroad company. It constructed a passageway or bridge across this trench, with uprights at each end, which supported a hand-rail on each side. The uprights nearest the track of the railroad were higher than the sills of the windows of the street cars, and were about three or four inches from the side of a passing car. Plaintiff was a passenger upon the railroad in the summer time; he was sitting at an open window of a car and had his arm broken as the car passed the bridge. In an action brought to recover damages, plaintiff claimed that the bridge was so insecurely built that one of the uprights fell upon his arm, which was at the time within the car. Defendant claimed that the injury was caused by plaintiff's arm extending so far out of the window that it came in contact with the upright. The testimony upon this point was conflicting. It did not appear that plaintiff was warned to keep his arm inside the car, or that there was any circumstance or anything in the condition of the street which should have caused plaintiff to have anticipated danger. The court charged the jury that if plaintiff sat with his arm out of the window, and it thus came in contact with the upright and was broken, it would not defeat his right to recover unless they found that such conduct was negligent. *Held,* no error; that the question was, under the circumstances, one of fact for the jury. *Francis v. N. Y. Steam Co.* 380

18. *It seems* there is a distinction in this respect between street and other railroads. *Id.*

19. Also, *held*, that a defendant having a right to a limited use of the street was required to so exercise its right as not to unnecessarily

endanger travelers; and that the question as to whether it had failed in this respect was properly submitted to the jury. *Id.*

20. The occupant or lessee of a dock or pier, to which vessels are allowed or invited to make fast for the purpose of discharging or receiving passengers or freight, is bound to keep and maintain the same in a reasonably safe condition and free from defects to those engaged or employed in carrying on such business. *Newall v. Bartlett.* 299

21. In an action to recover damages for injuries received through the alleged negligence of defendants, it appeared that they were copartners in business as warehousemen, and as such occupied a pier. By their consent a steamer was made fast to their pier, landed its passengers and discharged cargo; that plaintiff, in the performance of his duty as an employe of the owners of the steamer, was assisting in carrying baggage from the vessel on to the pier and within the inclosure where the baggage of the passengers was being deposited, when one of the doors to an opening in the inclosure of the pier fell over and struck him, inflicting the injuries complained of. The doors ran upon wheels overhead, which, at times, were thrown off the rail on which the wheels ran. Plaintiff gave evidence tending to show that defendants had notice of the dangerous character of these doors and that some of them had fallen before. *Held,* that whether the doors were properly constructed to secure safety, and whether the principle on which they were constructed was reasonably safe, and if so, whether they were operated with reasonable guards to secure safety, and also whether the machinery had become out of order and unsafe, were questions of fact for the jury; also, that it was proper to show not only what was said to a deceased member of the defendant's firm, but what he said in relation to the falling of the door or any of them at any time before the accident, and while the doors and the manner of operating them remained the same. *Id.*

22. Where a plaintiff alleges in his complaint that his person has been injured by the negligence of defendant, and proves the negligence and injury, the law implies damages, and he may recover such as necessarily and immediately flow from the injury, under a general allegation that damages were sustained; but if he seeks to recover damages for consequences which do not necessarily and immediately flow from the injury, he must allege the special damages he seeks to recover. *Gumb v. Twenty-third St R. Co.* 411
23. In an action to recover damages for injuries alleged to have been received by plaintiff through defendant's negligence, plaintiff's evidence tended to show that a hot coal, not as large as a pin head, from an engine on defendant's elevated road, fell into her eye, but there was no direct evidence that the locomotive from which it came was defective in design, construction, condition or operation, or that it was not supplied with the best known appliances for arresting sparks and cinders; nor was there evidence that defendant knew or had any means of identifying the locomotive complained of. It did not appear that more than one coal came from the engine on this occasion, or that coals were emitted from any of its locomotives on other occasions. It was claimed that, in the absence of explanatory evidence by defendant, proof of the falling of the coal was sufficient to authorize the jury to infer that the defendant negligently used a locomotive improperly designed, defectively constructed, out of repair or negligently operated. *Held*, untenable; and that the evidence did not authorize a verdict for the plaintiff; that defendant was not bound to assume the burden of showing the condition of all of its locomotives in use on that part of its line during the afternoon in question. *Wiedmer v. N. Y. E. R. Co.* 462
24. Plaintiff, a switchman employed in defendant's yard at E., while engaged in coupling cars stepped into a cattle-guard and was injured. In an action to recover damages, it appeared that the cattle-guard was near scales where defendant weighed its cars, and the cars, when pushed from the scales, passed over it; it had been there for several years, and no injury, so far as appeared, had resulted from it. Plaintiff had been in defendant's employ three days. The accident happened in the evening. Plaintiff had a lighted lantern and was directed to couple a car just pushed from the scales with one that had preceded it; the ends of the two cars which he sought to couple were over the cattle-guard; he stepped into it and the injury resulted. Plaintiff's duties had not previously called him to the place in question. *Held*, the fact that the location of the cattle-guard was at a place where cars, when weighed, were habitually coupled, imposed upon defendant the duty to use care to make that place reasonably safe for its employees; and the evidence authorized a finding that defendant, in permitting the cattle-guard to remain in that place in the condition it was, failed to perform its duty to its employees, and so was chargeable with negligence; also, that the evidence justified a finding that plaintiff had no knowledge of the cattle-guard, and was not guilty of negligence in failing to observe it. *Fredenburg v. N. C. R. Co.* 583
25. Plaintiff, a passenger in an open car on defendant's street railroad in the city of New York, while the car was in motion, left his seat and stepped out upon the side step, and was proceeding to go forward to another seat when he came in contact with one of the columns supporting an elevated railroad, under which defendant's road was operated, and was injured. In an action to recover damages the testimony was conflicting as to whether the seat plaintiff left was so crowded as to render it uncomfortable for him to remain. Defendant asked the court to charge the jury that, if they believe plaintiff left his seat unnecessarily and voluntarily, and while the car was in motion, without requesting the driver or conductor to stop the

same, and when upon the step of the car he swung himself outside the line of the step of the car and, while so doing, came in contact with the column, defendant was entitled to a verdict. The court refused so to charge. *Held*, error; that if, without reasonable cause, plaintiff placed himself outside of the car when in motion, he assumed the hazards of so doing. *Coleman v. Second Ave. R. R. Co.* 809

appearing, and when so construed, it appeared that no new office was created or intended thereby, but that the relator's promotion was to fill a supposed vacancy which did not, in fact, exist; that the proceedings of the board were not in conflict with the provisions of section 440 of the New York Consolidation act (§ 440, Chap. 410, Laws of 1882), and were regular and proper. *People ex rel. v. Fire Comrs., N. Y.* 67

NEW TRIAL.

A motion for a new trial, except in the cases specified in sections 999, 1000 and 1001 of said Code, must, in the first instance, be made at Special Term. *MacNaughton v. Osgood.* 574

NEW YORK (CITY OF).

1. On *certiorari* to review the action of the Board of Fire Commissioners of the city of New York in transferring the relator from duty as chief of battalion in the fire department to that of foreman, it appeared from the return of the board that in July, 1886, one McC. held the position of second assistant chief of the department; that the board of fire commissioners adopted a resolution discharging him for incompetency and incapacity; and, thereafter, on August 4, 1886, in good faith, believing said position to be vacant, by resolution promoted one R. to it from that of chief of battalion, and promoted the relator to the latter position from that of foreman. This resolution did not state that the promotion was made to fill a vacancy. Subsequently, on *certiorari*, the proceedings of the board in the removal of McC. were adjudged void and he was reinstated, and the persons so promoted were transferred back to their former positions. *Held*, that the return of the board must be taken as true; that its resolution promoting the relator must be construed in connection with the facts

2. The omission of an owner of a building in the city of New York used for business purposes, in which there is a hoisting elevator, to comply with the requirements of the statute of 1874 (Chap. 547, Laws of 1874), requiring that the openings in each floor shall be protected by such a substantial railing, and trap doors to close the same, as shall be approved by the superintendent of buildings, and that such trap-doors shall be closed at all times, except when in actual use, is *prima facie* evidence of negligence, in an action by one lawfully upon the premises who has sustained injury in consequence of a failure to comply with the statute. *McRicard v. Flint.* 222
3. The exercise of the duty imposed by the statute is not dependent upon the action of the superintendent of buildings. The owner may not properly delay compliance until he shall receive directions, but it is incumbent upon him to call upon the officer for directions and approval. *Id.*

4. The relator, a patrolman of the police force of the city of New York, was arrested by his superior officer on June 13, 1879, on a charge of felony, and was imprisoned until January 17, 1880, when he was acquitted on trial. On that day he reported for duty. On January twenty-four he was dismissed from the force. In proceedings by *mandamus* to compel payment of his salary from the time of his arrest to that of his dismissal, defendant claimed that under the provision of the act of

1873, supplemental to the city charter of that year (§ 5, chap. 755, Laws of 1873), which provides that "any member of the police force who shall be absent from duty without leave for the term of five days shall * * * cease to be a member of the police force," the relator's title to the office ceased on June eighteenth. *Held* (FOLLETT, Ch. J., BROWN and HAIGHT, JJ., dissenting), untenable; that an enforced absence, caused by an unjustifiable arrest and detention, as was the case here, was not within the intendment of the statute. *People ex rel. v. Police Comrs., N. Y.* 245

NUISANCE.

Prior to 1877 defendant operated a horse car railroad on Third avenue in the city of B. By an ordinance of the common council of the city, pursuant to the act of 1873 (Chap. 432, Laws of 1873), it was authorized to run cars by steam motors between the city line on the south and Twenty-fourth street on the north. It did not stop its cars so propelled, however, at said street, but passed into and along it for some distance, backed into Third avenue, and then in front of plaintiffs' premises, which are situated on the north-westerly corner of Third avenue and Twenty-fourth street, they were switched onto another track, making much noise, shaking plaintiffs' buildings, casting cinders, smoke and dust upon their premises, and interrupting the ordinary use of the street. In an action to recover damages, *held*, that plaintiffs, although not owners of the street, as abutting owners had such an easement therein as to enable them to insist, as against defendant, that it should be devoted only to the uses consistent with a public street; that the use of steam as a motive power in the manner stated was unlawful and in the nature of a nuisance, and plaintiffs were entitled to recover the damages sustained. *Hussner v. B'klyn C. R. R. Co.* 433

OFFICE AND OFFICERS.

On *certiorari* to review the action of the Board of Fire Commissioners of the city of New York in transferring the relator from duty as chief of battalion in the fire department to that of foreman, it appeared from the return of the board that in July, 1886, one McC. held the position of second assistant chief of the department; that the board of fire commissioners adopted a resolution discharging him for incompetency and incapacity; and thereafter, on August 4, 1886, in good faith, believing said position to be vacant, by resolution promoted one R. to it from that of chief of battalion, and promoted the relator to the latter position from that of foreman. This resolution did not state that the promotion was made to fill a vacancy. Subsequently, on *certiorari*, the proceedings of the board in the removal of McC. were adjudged void and he was reinstated, and the persons so promoted were transferred back to their former positions. *Held*, that the return of the board must be taken as true; that its resolution promoting the relator must be construed in connection with the facts appearing, and when so construed, it appeared that no new office was created or intended thereby, but that the relator's promotion was to fill a supposed vacancy which did not, in fact, exist; that the proceedings of the board were not in conflict with the provisions of section 440 of the New York Consolidation act (§ 440, chap. 410, Laws of 1888), and were regular and proper. *People ex rel. v. Fire Comrs., N. Y.* 67

PARTIES.

An action to compel the determination of a claim to real property is not maintainable against an infant. *Weiler v. Nembach.* 36

PARTNERSHIP.

1. While one or more members of a

copartnership cannot execute a general assignment for the benefit of creditors, with or without preferences, without the consent of all, if it appears by the acts or declarations, before or after the assignment of the member or members who did not sign, that he or they assented to making it, or that it was made by his or their authority, it is valid. *Klumpp v. Gardner.* 153

2. Defendants D. and G. were copartners; the firm being in straitened circumstances G. started for Australia, with a view of making sales of goods there in sufficient amounts to relieve it from its embarrassment, leaving D. in charge of the business. G. wrote D. from San Francisco urging him to continue the business and get extensions of time, but "should you have to make an assignment" then to make certain persons named preferred creditors and put in certain specified stocks as assets. The pressure from creditors became so great that G. subsequently made a general assignment of the firm assets, executing it in the name of the firm, in the name of G. by D. "by authorization," and in his own name, and acknowledging it. *Held,* that the letter was to be understood as giving D. authority to execute the assignment at any time when it should become necessary during G.'s absence; and so, the assignment was valid; that while the attempted execution and acknowledgment in the name of G. was invalid, it might be treated as surplusage. *Id.*

3. D. had, before making the assignment, paid the debts due the persons G. had requested him to prefer. *Held,* that the fact they could not be preferred did not terminate the authority to make the assignment. *Id.*

4. Defendants were copartners doing business as private bankers. All capital was furnished by S., the other members contributing simply their services. S. was advised by his partners that the firm was about to suspend. He had at the time to his credit in a private ac-

count with the firm over \$10,000, consisting of deposits made independent of his capital account. S. drew his individual check on his private account which he delivered to plaintiff with directions to pay therewith certain debts of his. All the other partners had knowledge of the check and its purpose, and it was agreed that it should be paid out of the cash items then in hand, and the check was charged to the said individual account. On presentation of the check one of the partners offered to pay the amount in currency, but at plaintiff's request a draft was given instead, drawn by the firm upon a New York bank, which was not paid. In an action upon the draft the defendants, other than S., defended on the ground that plaintiff had no title to the draft, but that S. was, in fact, the owner and that the latter could not in his own name, or in that of another, maintain an action against himself and copartners as makers of the draft. *Held,* untenable; that so far as his deposit account was concerned S. stood in the same position toward the firm, as between the copartners, as that of any other depositor, and could have enforced his right to draw out the fund in an action brought directly against his partners; and that he could transfer this right, and having so done, it was no concern of his partners, and they were not entitled to inquire as to whether the transfer was with or without consideration; also, that, as the rights of creditors were not involved, the fact that the firm had failed did not affect defendants' liability. *Stettheimer v. Tone.* 501

PATENT (FOR LAND).

As to authority of commissioners of land office to grant lands under the waters of navigable streams.

See Rumsey v. N. Y. & N. H. R. R. Co. 428

PAYMENT.

1. In an action upon an undertaking,

given on appeal from a judgment, brought by plaintiff as assignee of the judgment, the defense was that S., plaintiff's assignor, obtained the judgment as trustee of an express trust, for R., and that L., the judgment-debtor, had paid the judgment to R., who acknowledged satisfaction thereof. The assignment of the judgment to plaintiff was executed and recorded prior to the alleged payment and satisfaction. Neither the defendants N. or S. had notice of the assignment at the time of payment other than that given by the assignment record. *Held*, that the defense was not available; that, as S. brought the action, wherein the undertaking was given, in his own name, not as agent, the question as to his right to recover was an issuable fact, and was necessarily determined in that action, and defendants were concluded by their agreement to pay the judgment, if it was affirmed, from again bringing into question any issuable facts so determined; that, conceding the judgment recovered by S. was for the benefit of R., S. was the legal owner, and although, had the settlement been effected with the latter while S. was such legal owner, he would have been bound by it, yet he had the power to sell and transfer the judgment, and having done so, R.'s interest therein ceased and plaintiff, the assignee, became the legal and equitable owner, and his rights as such were not affected by the payment to R. *Seymour v. Smith*. 481

2. The rule protecting a judgment-debtor who has paid the judgment to the former owner after an assignment thereof, when he has had no notice of the assignment, does not extend to one claiming to be the beneficial owner; it only applies to those having the legal title. *Id.*

3. To make a payment to one, not the legal owner, effectual, the duty devolves upon the payor of showing that the person to whom payment was made, had, at the time, a right to receive payment. *Id.*

See APPLICATION OF PAYMENTS.

PENAL CODE.

§ 168. *Leonard v. Poole*. 871

PIERS.

See WHARVES.

PLEADING.

1. Plaintiff's complaint alleged, in substance, that he was the holder of a chattel mortgage covering a portion of the furniture and fixtures of a hotel; that defendant H. was the holder of two junior mortgages covering portions of said property, and some not covered by plaintiff's mortgage; that defendant W. held another mortgage covering all of said property; that the sheriff, by virtue of a judgment and execution in favor of defendant L. against the person holding the property and carrying on the hotel, had levied upon said property and was proceeding to sell the same; that W., L. and the sheriff claimed their liens were prior to that of plaintiff's mortgage because of his omission to renew it by refiling; that the property, if sold in bulk, would produce enough to pay all the liens, but would bring much less if sold separately with the conflicting claims thereon. The complaint asked for the appointment of a receiver, with authority to sell the property in bulk and distribute the proceeds under the direction of the court and in accordance with the rights and priorities of the parties. *Held*, that the complaint set forth various subjects of equitable jurisdiction, i. e., the foreclosure of chattel mortgages, the determination between creditors of the extent and priority of conflicting liens, the advantages to creditors of a sale in bulk instead of in separate parcels, each of which was sufficient to maintain an action in equity, and their combination in one complaint would not defeat the action; also, that, in the absence of a demurrer or answer presenting the question

- that plaintiff had a remedy at law, that objection could not be raised. *Ostrander v. Weber.* 95
2. The defendant, in an equity action, in order to insist that an adequate remedy exists at law, must set it up in his answer. *Id.*
3. Plaintiff's mortgage was given to secure him from liability as endorser upon notes made by the mortgagors. *Held,* the objection that the holder of the notes was not made a party, not having been raised by demurrer or answer, was not available here. *Id.*
4. *It seems* that if it had been raised, it would not have been tenable; that plaintiff was, in respect to the notes, the trustee for the holder and represented said holder to all intents and purposes. *Id.*
5. Plaintiff's complaint set forth, in substance, that he was employed by defendant to act as its attorney for one year under an agreement by which he was to receive, as compensation for his services, a transfer of 300 shares of its capital stock; that he performed the services and demanded the stock, but defendant refused to deliver the same. Plaintiff asked to recover the stock or its value. The answer admitted the employment, but denied any express agreement as to compensation. Upon the trial it appeared the agreement, substantially as averred in the complaint, was made on the part of defendant by its president. Defendant moved to dismiss the complaint on the ground that there was no proof of authority on the part of its president to make the contract. *Held,* that the motion was properly denied, as the authority of the president was admitted by the answer; that if defendant desired to present the question that the president was not authorized to contract to pay in stock, the attention of the trial court should have been called to it; and this not having been done, that it was not available on appeal. *Merrill v. Consumers' Coal Co.* 216
6. Where a general guardian of an infant brings an action in his own name as such guardian for an injury to his ward's estate, the question as to his "legal capacity" to maintain the action, if not taken by demurrer or answer, is waived. (Code of Civil Pro. § 490.) *Perkins v. Stimmel.* 859
7. In an action to recover damages for personal injuries to plaintiff, and also for injuries to his wagon, the complaint alleged that he was "put to expense in repairing the same and endeavoring to be healed of his own hurts, and prevented from going on with his business." There was no allegation that he expended money in hiring others to work in his place. Plaintiff was permitted to testify, under objection, that the evidence was not within the issue, that while suffering from his injury he employed two men to work in his place and paid them \$185. *Held,* error. *Gumb v. Twenty-third Street R. Co.* 411
8. Where a plaintiff alleges in his complaint that his person has been injured by the negligence of defendant, and proves negligence and injury, the law implies damages, and he may recover such as necessarily and immediately flow from the injury, under a general allegation that damages were sustained; but if he seeks to recover damages for consequences which do not necessarily and immediately flow from the injury, he must allege the special damages he seeks to recover. *Id.*

PLEDGE.

Where one takes title to personal property simply to secure himself as surety upon a bond of his assignors, he has no interest in the property that he can sell until after a breach in the condition of the bond. His title is both personal and contingent, and by an assignment before the contingency named has happened, he parts with his security without transferring any right to his assignee. *Comley v. Duzian.* 161

POLICE.

1. The relator, a patrolman of the police force of the city of New York, was arrested by his superior officer on June 18, 1879, on a charge of felony, and was imprisoned until January 17, 1880, when he was acquitted on trial. On that day he reported for duty. On January twenty-four he was dismissed from the force. In proceedings by *mandamus* to compel payment of his salary from the time of his arrest to that of his dismissal, defendant claimed that under the provision of the act of 1873, supplemental to the city charter of that year (§ 5, chap. 755, Laws of 1873), which provides that "any member of the police force who shall be absent from duty without leave for the term of five days shall * * * cease to be a member of the police force," the relator's title to the office ceased on June eighteenth. *Held*, FOLLETT, Ch. J., BROWN and HAIGHT, JJ., dissenting), untenable; that an enforced absence, caused by an unjustifiable arrest and detention, as was the case here, was not within the intentment of the statute. *People ex rel. v. Police Comrs., N. Y.* 245
2. The authorities bearing upon the subject collated. *Id.*
3. The trial court gave a money judgment against the defendant. *Held*, error. *Id.*

PRACTICE.

1. In order to raise any question upon the ruling of the trial court, as to requests to charge, for review in this court the exception must be specific and point out the particular request to which it is intended to apply. *Newall v. Bartlett.* 399
2. The record on appeal in an equity action showed that the action was brought to trial at a circuit before a jury; that at the close of the evidence defendant's counsel moved to dismiss the complaint and plaintiff asked to go to the jury upon

certain questions of fact. Plaintiff's motion was denied, the complaint dismissed and exceptions ordered to be heard in the first instance at General Term. At General Term an order was entered overruling the exceptions and denying plaintiff's motion for a new trial, and a judgment was then entered which recited the trial, the direction for the dismissal of the complaint, the exceptions thereto, the order that they be heard in the first instance at General Term, the motion for a new trial and the decision of the General Term thereon, and adjudged that the complaint be dismissed, with costs and disbursements. Plaintiff appealed to this court, stating in his notice of appeal that he intended to bring up for review the order of the General Term denying the motion for a new trial. *Held*, that the record presented no question for review upon the merits; that, regarding the proceeding as a trial by the court, no decision was made as required by the Code of Civil Procedure; that there was no authority to direct exceptions in a case triable by the court to be heard in the first instance at the General Term, that proceeding being limited to a case triable by a jury. (§ 1000.) *MacNaughton v. Osgood.* 574

3. A motion for a new trial, except in the cases specified in sections 999, 1000 and 1001 of said Code, must, in the first instance, be made at Special Term. *Id.*

4. In an equity action the complaint cannot be dismissed on a trial of questions of fact by the jury. A verdict must be rendered upon all the questions submitted and the case afterwards brought to a hearing before the court the same as if there had been no verdict. *Id.*

— When evidence is received without objection, and no motion made to strike out, a subsequent objection and exception not available on appeal.
See Hangen v. Hachemester. 568

See EVIDENCE.
EXCEPTIONS.
PLEADING
TRIAL.

PRESUMPTIONS.

1. It seems that, where it appears that a vessel, shortly after sailing, becomes leaky and sinks without encountering any peril or storm, this is presumptive evidence of unseaworthiness. *Berwind v. Greenwich Ins. Co.* 231
2. Where it is made to appear that a check, indorsed over by the payee, was altered after his indorsement without his consent, the presumption is that it was so made as to vitiate it, as against the indorser, and the burden is upon the party seeking to enforce it to relieve it from the effect of the unauthorized indorsement by showing that it was made by a stranger to the instrument. *Nat. Ulster Co. Bk. v. Madden.* 280
3. In an action of ejectment plaintiff claimed under a deed which was delivered to her husband in trust for her benefit by the grantor, with a request that it should be kept secret until her death. Plaintiff was in the house when the deed was prepared and executed and was present at a conversation shortly before when the grantor announced her intention to convey the property to plaintiff. *Held,* the circumstances authorized the presumption that the deed was delivered with the intent that it should take effect as a present conveyance and that it was accepted by plaintiff, and this having been found by the jury that it became operative as a conveyance. *Crain v. Wright.* 307
4. An elevator in a building, for the carriage of persons, is not supposed to be a place of danger, to be approached with great caution; on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen or make a special examination. *Toussey v. Roberts.* 313
5. In the absence of a decree to the effect that none of the property of an infant has come into the hands of the personal representatives of a deceased guardian, the presumption is that said representatives have possession of the infant's estate, and until it is otherwise established a devbastavit will not be presumed. *Perkins v. Stimmel.* 359
6. In an action to recover damages for injuries alleged to have been received by plaintiff through defendant's negligence, plaintiff's evidence tended to show that a hot coal, not as large as a pin head, from an engine on defendant's elevated road, fell into her eye, but there was no direct evidence that the locomotive from which it came was defective in design, construction, condition or operation, or that it was not supplied with the best known appliances for arresting sparks and cinders; nor was there evidence that defendant knew or had any means of identifying the locomotive complained of. It did not appear that more than one coal came from the engine on this occasion, or that coals were emitted from any of its locomotives on other occasions. It was claimed that, in the absence of explanatory evidence by defendant, proof of the falling of the coal was sufficient to authorize the jury to infer that the defendant negligently used a locomotive improperly designed, defectively constructed, out of repair or negligently operated. *Held,* untenable. *Wiedmer v. N. Y. E. R. R. Co.* 462
7. In an action to recover damages for an alleged breach of warranty, it appeared that defendant, a commission merchant, as such, sold to plaintiffs a quantity of antelope skins, with a warranty as to quality, and that there was a breach of such warranty; that plaintiffs knew defendant was acting as agent in making the sale, but defendant did not disclose to them, nor did it appear that they knew the names of the principals. It did not appear that the principals gave defendant any description of the quality or condition, or that he acted otherwise than on his own knowledge or judgment in that respect in making the sale

and warranty, nor was it found that he had authority from his consignors to warrant the goods. Evidence was given by defendant that it was the custom in the trade for commission dealers not to warrant goods sold. *Held*, that the warranty was defendant's undertaking and he was liable for its breach; that in such case the presumption is that the responsibility is upon the person with whom the vendee deals, and he is not required to look elsewhere. *Argersinger v. MacNaughton*. 535

liberty to dispose of the property; and that, as under the agreement with defendant, the latter had no power to complete the sale or deliver the property until he had obtained plaintiffs' approval as to price, the unauthorized sale was a conversion; and so, the action was maintainable. *Comley v. Dazian*.

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PRINCIPAL AND AGENT.

1. When a raised draft, forwarded by a bank to its correspondent bank for collection is presented by the latter, as agent, and the drawee, through mistake, pays it, the collecting bank cannot be required to repay, if it has paid over to its principal before notice of the mistake. *Nat. Park Bk. v. Seaboard Bank*. 28
2. There is no difference between the powers, duties and liabilities of agents of corporations and those of natural persons, unless expressly made by the act of incorporation or by-laws. *N. Y. P. & B. R. R. Co. v. Dixon*. 80
3. Plaintiffs executed to one F. a bill of sale of certain goods, absolute in form, but which was intended merely as security; the goods remained in plaintiffs' possession. Subsequently F., at the request of plaintiffs, transferred the goods by bill of sale to defendant. This was done under an arrangement that defendant should take possession of the goods and with the consent and approval of plaintiffs, and not otherwise, sell them and distribute the proceeds among plaintiffs' creditors as directed; the assignment being made to avoid trouble with creditors. Defendant sold the goods without such consent and retained the proceeds. In an action for conversion, *held*, that the transfer by F. was simply a formal waiver of his security and left plaintiffs at
4. Also, *held*, that, in the absence of evidence of the acceptance or adoption of the arrangement by plaintiffs' creditors, they had no legal interest in defendant's promise as to distribution; that such direction was revocable and a demand made before commencement of the action was sufficient notice of plaintiffs' intention to revoke it. *Id.*
5. An agent intrusted with property to sell at a price to be approved by his principal, if he sells without such approval, is liable for a conversion. *Id.*
6. Plaintiff's complaint set forth, in substance, that he was employed by defendant to act as its attorney for one year under an agreement by which he was to receive, as compensation for his service, a transfer of 800 shares of its capital stock; that he performed the services and demanded the stock, but defendant refused to deliver the same. Plaintiff asked to recover the stock or its value. The answer admitted the employment, but denied any express agreement as to compensation. Upon the trial it appeared the agreement, substantially as averred in the complaint, was made on the part of defendant by its president. Defendant moved to dismiss the complaint on the ground that there was no proof of authority on the part of its president to make the contract. *Held*, that the motion was properly denied, as the authority of the president was admitted by the answer; that if defendant desired to present the question that the president was not authorized to contract to pay in stock, the attention of the trial court should have been called to it; and this not having been done,

that it was not available on appeal.
Merrill v. Consumers' Coal Co. 216

7. It appeared that defendant had, from its organization, employed attorneys by the year and paid them in its stock, that the contract had been made by the president, with the approval of the board of directors, and that plaintiff rendered the services called for by his contract with the knowledge of the directors. *Held*, that the evidence was sufficient to warrant a finding that the contract was approved of or acquiesced in by the directors. *Id.*

8. Prior to 1838 a dam was built across the outlet of Owasco lake, which was used for hydraulic purposes by the proprietors. In 1857 an act was passed (Chap. 527, Laws of 1857) appropriating the dam for the use of the Erie canal, subject however to the use for hydraulic purposes by the owners of such dam at the time of such appropriation. The canal commissioners were authorized to increase the height of the dam, and to appropriate for the purpose the necessary lands, water rights, etc. In pursuance of a resolution of the canal board, flush gates were put upon the dam by the commissioner in charge, raising the water in the lake. In 1878 plaintiff presented a claim against the state for permanent damages to his adjoining lands, and an award was made to him therefor. Under an act of 1874 (Chap. 899, Laws of 1874), the dam was rebuilt of the same height as the old one, with flush gates two feet in height taken from the old dam and built into the new. In 1881 defendant, who was a director and the superintendent of a corporation, one of the proprietors of the dam at the time of its appropriation in 1857, acting under an authority in writing of the assistant superintendent of public works, given to him two years before, opened the gates of the dam and the water overflowed said lands of the plaintiff. Said assistant reported promptly to the superintendent the authority so given, and he had allowed it to remain in force. In an action to recover

damages, *held*, that, assuming that the commissioners did not proceed in all things as required by statute, yet the legislature, in subsequently making appropriations and passing laws upon the subject, must be deemed to have acted with reference to what had been done by the canal authorities, and to have adopted and ratified their acts; and that, therefore, at the time in question, the state had the right to use the flush gates, and the remedy, if any, of any person whose property was injured by such act was by claim for compensation from the state; that the appointment of defendant to take charge of the gates must be deemed to have been ratified by the superintendent; also, that defendant was not ineligible under the provision of the Revised Statutes (1 R. S. 250, § 185), which declares that no person owning any hydraulic works "dependent on the canals for their supply, or employed in or connected with such works, shall be employed as an agent upon the canals," as the said corporation was not dependent upon the canals, its right to the use of the water having been reserved by the act of 1857 (*supra*); that the subsequent action of the state must be presumed to have been subject to the original rights reserved; and that, therefore, the action was not maintainable. *Shaver v. Eldred.* 286

9. Where a number of persons and firms have conspired together, in violation of the statutes (3 R. S. 693, § 8, sub. 6; Penal Code, § 168), to do acts injurious to trade, for instance, to unlawfully advance the price of an article of food, the courts will not intervene in favor of any one of the parties to give him redress for frauds perpetrated by another to his detriment in carrying out the unlawful enterprise. *Leonard v. Poole.* 871

10. It does not affect the question that the party complained of as guilty of the fraud was acting as agent for the others. All those who knowingly promote and participate in carrying out a criminal scheme are principals, and the fact that one acts, in some respects, in

- subordination to the others, does not render him less a principal. *Id.*
11. Where, therefore, a broker, who was one of the parties to an unlawful scheme to advance the price of lard, but who acted in carrying out the scheme simply as agent for the others, was proved to have defrauded his principals, *held*, that an action to compel him to account was not maintainable; that the courts would not aid in adjusting differences arising out of and requiring an investigation of the illegal transactions. *Id.*
12. Written application for fire insurance was made by a broker on behalf of plaintiff to defendant's agents. The agents orally agreed to insure from the date of the application, provided the company was not already "on the risk." The authority of the agents was contained in two letters, one from defendant's general agent, the other from its secretary, both mailed before the making of the contract, but not received by the agents until after the fire. *Held*, the authority dated from the mailing of the letters. *Ruggles v. Am. O. Ins. Co.* 415
13. The letter from the general agent contained this statement: "Please do not undertake to write any specials for us at present." The secretary's letter stated that "a commission of authority, as agents of this company in the city of Brooklyn," had been forwarded to the agents, adding, "We deem it unnecessary to enter into any detailed instructions as to the conduct of our business at your agency," giving as a reason that the general agent had written on the subject. The risk in question was a special one. *Held*, that the authority given by defendant was that of general agents, and did not exclude the taking of special risks; that the reference to "detailed instructions" did not limit the agent's power; that it referred to the manner of conducting the business, not to the authority to be exercised by the agent. *Id.*
14. A general agent may bind his principal by an act within the scope of his authority, although it may be contrary to his special instructions. *Id.*
15. Unless the character or quality of goods consigned to a commission merchant to sell is communicated to him by the consignors, it is his duty to ascertain what they are in that respect and put them upon the market only as such. No authority to undertake that the goods are in any respect other or different from what they are may be inferred from the simple power to sell. *Argersinger v. MacNaughton*. 585

PRINCIPAL AND SURETY.

1. Defendants executed to plaintiff an instrument in writing by which, for a valuable consideration, they agreed that F., who the instrument stated "has purchased, or is about to purchase, anthracite coal" of defendant, "shall pay said company at such time or times, and at such prices as may be agreed upon" between them, "for all coal that may be shipped to him up to the 1st day of May, 1882." In case of default of F. defendants agreed "to pay for the same, whether the indebtedness be in open account or embraced in notes, drafts or bills of exchange." In an action upon the instrument the defense was that plaintiff had extended the term of credit given to F. at the time coal was purchased, without the assent of defendants. *Held*, untenable; that the instrument was not made with reference to any then existing contract between F. and plaintiff fixing the time of credit, and it neither expressed or by implication limited the period of credit to the time fixed when a purchase was made, but left it subject to any future arrangement. *D., L. & W. R. R. Co. v. Burkard.* 197
2. K., one of the defendants, was a married woman, not engaged in any business, and it did not appear that the instrument was executed for her benefit or for that of her

separate estate. *Held*, that a nonsuit was properly directed as to her. *Id.*

8. Plaintiff offered to prove the terms of the first contract of sale made with F. after the execution of the instrument. This offer was rejected. *Held*, error. *Id.*

4. An action at law cannot be maintained against the sureties upon the bond of a general guardian until proceedings for an accounting have been had against the guardian and his default established therein. *Perkins v. Stimmel.* 859

5. The fact of the death of the guardian does not take the case out of the rule, as his personal representatives may be required to account (Code of Civil Pro. § 2606, as amended by Chap. 899, Laws of 1884), and before the sureties can be sued the proceedings on the accounting must at least establish the fact that none of the infant's property has come into the hands of the personal representatives. *Id.*

PUBLIC POLICY.

1. Defendant and one Q. entered into a written contract, which provided that the latter should build, upon certain lands belonging to the former, a dock and erect thereon a pocket for holding and storing coal. Defendant was to have the use of the south side of the dock and of thirty feet of the shore end and the right to use the other portions when not required by Q. In consideration thereof defendant agreed to transport in its cars all the coal in car loads offered for transportation by Q. for the term of ten years at a rebate of fifteen cents per ton from the regular tariff rates, Q. to load the coal, and it was understood he was to ship large quantities. At the termination of the contract the dock and structures were to be appraised and the value thereof, less \$2,000 advanced by defendant, paid to Q. The dock and coal-pocket were constructed, pursuant to this agreement, at an expense of \$17,000,

and coal in large quantities shipped over defendant's road by Q. or his assignee under the contract. In an action to recover the rebate agreed upon, defendant claimed that the contract was against public policy and, therefore, illegal and void. There were no findings or requests to find, as matter of fact, that there was any unjust discrimination. *Held*, that this could not be found as matter of law, and in the absence of such a finding the action was not maintainable. *Root v. L. I. R. R. Co.* 300

2. An agreement of parties to an action to limit judicial inquiry, when not unreasonable or against good morals or public policy, is binding upon the courts. *H. K. and S. Bkg. Corp. v. Cooper.* 388

QUESTIONS OF LAW AND FACT.

— When question of negligence one of fact.

See Connolly v. K. Ice Co. 104
McRickard v. Flint. 223
Francis v. N. Y. S. Co. 380
Newall v. Bartlett. 399

— When question of negligence one of law.

See Bohn v. Havemeyer. 296
Coleman v. S. A. R. R. Co. 609

RAILROAD CORPORATIONS.

1. The fact that a passenger on a street car stands upon the outer platform when there is opportunity to take a seat in the car, while it will ordinarily constitute a defense in an action against the railroad company, it is not a defense in an action against another party to recover damages for negligence causing injury to the passenger. *Connolly v. Knick. Ice Co.* 104

2. A railroad corporation may not make an unreasonable or unjust discrimination between its customers in its freight charges. *Root v. L. I. R. R. Co.* 300

8. The question as to whether such discrimination has been made is ordinarily one of fact. *Id.*
4. Defendant and one Q. entered into a written contract, which provided that the latter should build, upon certain lands belonging to the former, a dock and erect thereon a pocket for holding and storing coal. Defendant was to have the use of the south side of the dock and of thirty feet of the shore end and the right to use the other portions when not required by Q. In consideration thereof defendant agreed to transport in its cars all the coal in car loads offered for transportation by Q. for the term of ten years at a rebate of fifteen cents per ton from the regular tariff rates, Q. to load the coal, and it was understood he was to ship large quantities. At the termination of the contract the dock and structures were to be appraised and the value thereof, less \$2,000 advanced by defendant, paid to Q. The dock and coal-pocket were constructed, pursuant to this agreement, at an expense of \$17,000, and coal in large quantities shipped over defendant's road by Q. or his assignee, under the contract. In an action to recover the rebate agreed upon, defendant claimed that the contract was against public policy, and, therefore, illegal and void. There were no findings or request to find, as matter of fact, that there was any unjust discrimination. *Held*, that this could not be found, as matter of law, and in the absence of such a finding the action was not maintainable. *Id.*
5. Defendant lawfully opened a trench in a city street parallel with the track of a street railroad company. It constructed a passageway or bridge across this trench, with uprights at each end, which supported a hand-rail on each side. The uprights nearest the track of the railroad were higher than the sills of the windows of the street cars, and were about three or four inches from the side of a passing car. Plaintiff was a passenger upon the railroad in the summer time; he was sitting at an open window of a car and had his arm broken as the car passed the bridge. In an action brought to recover damages, plaintiff claimed that the bridge was so insecurely built that one of the uprights fell upon his arm, which was at the time within the car. Defendant claimed that the injury was caused by plaintiff's arm extending so far out of the window that it came in contact with the upright. The testimony upon this point was conflicting. It did not appear that plaintiff was warned to keep his arm inside the car, or that there was any circumstance or anything in the condition of the street which should have caused plaintiff to have anticipated danger. The court charged the jury that if plaintiff sat with his arm out of the window, and it thus came in contact with the upright and was broken, it would not defeat his right to recover unless they found that such conduct was negligent. *Held*, no error; that the question was, under the circumstances, one of fact for the jury. *Francis v. N. Y. Steam Co.* 380
6. It seems there is a distinction in this respect between street and other railroads. *Id.*
7. A railroad company that has acquired title to land under water some distance from the shore for the purpose of constructing its road-bed, and has built thereon an embankment supporting its tracks, leaving a bay between the embankment and the original shore line into which the tide ebbs and flows, is not a "proprietor of adjacent lands" within the meaning of the provision of the Revised Statutes (1 R. S. 208, § 67), prohibiting the commissioners of the land office from making grants of land under the waters of navigable streams "to any person other than the proprietor of the adjacent lands," and the owner of the upland adjoining the original shore, not the railroad corporation, is entitled to the grant. *Rumsey v. N. Y. & N. E. R. R. Co.* 428
8. It seems the provision of the General Railroad Act of 1850 (§§ 25-49, chap. 140, Laws of 1850), empowering said commissioners to make

- grants of state lands to railroad corporations, includes a power to grant to such a corporation lands under water for the erection of docks necessary to the transaction of its business. *Id.*
9. It was the intent of the legislature, in the passage of the act of 1846 creating the H. R. R. R. Co., and authorizing the construction of its road along the east shore of the Hudson river (Chap. 216, Laws of 1846), to protect the upland owners along said shore in their access to the waters of the river, and to maintain their rights in the river unimpaired by the construction of the railroad (§§ 15, 16), and it did not change the policy of the state with reference to the promotion of commerce on the river, or deprive the said commissioners of the power to make grants of land under water to the owner of the uplands. *Id.*
10. Plaintiffs are the owners of certain uplands bordering upon the easterly shore of the Hudson river. In 1848 their predecessors in title deeded to the H. R. R. R. Co. a strip of land, partly above high-water mark and partly under the water of the river, retaining, however, a large part of the original shore line. Upon said strip the railroad company constructed an embankment several feet above high-water mark for their road-bed, which embankment is between plaintiffs' uplands and the channel of the river, but a considerable distance outside of the original shore line. A culvert or opening was built in the embankment, through which the waters flowed into the bay, between it and the said shore line. In 1868 said company obtained from the commissioners of the land office a grant of the land under water covered by its road-way, and extending westward into the river 200 feet. In 1885 said commissioners executed to plaintiffs a grant of land under water extending along the whole water front of their uplands, and westward into the river a considerable distance beyond the said company's road, the grant ex- pressly excepting and reserving the rights of said company. In 1881 defendant built a portion of its road in the waters of the river, in front of plaintiffs' uplands, west of the H. R. R. R. Co.'s road; partly on the land so granted to said company and partly outside, but within the lines of plaintiffs' grant. *Held*, that the grant to the plaintiffs was valid, and that an action was maintainable to restrain defendant from operating its road over and upon the lands so granted. *Id.*
11. Prior to 1877 defendant operated a horse car railroad on Third avenue in the city of B. By an ordinance of the common council of the city, pursuant to the act of 1873 (Chap. 432, Laws of 1873), it was authorized to run cars by steam motors between the city line on the south and Twenty-fourth street on the north. It did not stop its cars so propelled, however, at said street, but passed into and along it for some distance, backed them into Third avenue, and then in front of plaintiffs' premises, which are situated on the northwesterly corner of Third avenue and Twenty-fourth street, they were switched onto another track, making much noise, shaking plaintiffs' building, casting cinders, smoke and dust upon their premises, and interrupting the ordinary use of the street. In an action to recover damages, *held*, that plaintiffs, although not owners of the street, as abutting owners had such an easement therein as to enable them to insist, as against defendant, that it should be devoted only to the uses consistent with a public street; that the use of steam as a motive power in the manner stated was unlawful and in the nature of a nuisance, and plaintiffs were entitled to recover the damages sustained. *Hussner v. Bklyn City R. R. Co.* 433
12. The evidence tended to show that said unlawful acts depreciated the rental value of plaintiffs' premises. *Held*, that such depreciation was a proper measure of damages. *Id.*

18. Under the instructions of the court, recovery was had for such damages up to the time of the trial. No objection was made that the recovery should have been limited to the damages which accrued before the commencement of the action. *Held*, that the question could not be presented on appeal.
14. *It seems* the recovery is a bar to any future claim for damages up to the time of trial. *Id.*
15. Plaintiffs' complaint alleged, in substance, that they owned the fee of the avenue to its center, and that defendant unlawfully operated its cars within and upon their half of the avenue. On the trial plaintiffs waived any right to recover nominal damages for trespass and claimed only to recover the damages to their premises occasioned by the nuisance, and the court, in its charge, made the right to recover dependent upon the finding of the jury that there had been a substantial injury to the premises and that the question as to whether they were bounded by the center of the avenue had no importance. Defendant's counsel requested the court to charge that plaintiffs had no title to the fee in the avenue and that defendant had not trespassed upon their property. The court declined to charge other than as before charged. *Held*, that, as the question of title and trespass was, by the waiver of plaintiffs' counsel and the charge made, out of the case, defendant could not have been prejudiced by the refusal. *Id.*
16. Plaintiff, a switchman employed in defendant's yard at E., while engaged in coupling cars stepped into a cattle-guard and was injured. In an action to recover damages, it appeared that the cattle-guard was near scales where defendant weighed its cars, and the cars, when pushed from the scales, passed over it; it had been there for several years, and no injury, so far as appeared, had resulted from it. Plaintiff had been in defendant's employ three days. The accident happened in the evening. Plaintiff had a lighted lantern and was directed to couple a car just

pushed from the scales with one that had preceded it; the ends of the two cars which he sought to couple were over the cattle-guard; he stepped into it and the injury resulted. Plaintiff's duties had not previously called him to the place in question. *Held*, the fact that the location of the cattle-guard was at a place where cars, when weighed, were habitually coupled, imposed upon defendant the duty to use care to make that place reasonably safe for its employees; and the evidence authorized a finding that defendant, in permitting the cattle-guard to remain in that place in the condition it was, failed to perform its duty to its employees, and so was chargeable with negligence; also, that the evidence justified a finding that plaintiff had no knowledge of the cattle-guard, and was not guilty of negligence in failing to observe it. *Fredenburg v. N. C. R. Co.* 582

17. Plaintiff, a passenger in an open car on defendant's street railroad in the city of New York, while the car was in motion, left his seat and stepped out upon the side step, and was proceeding to go forward to another seat when he came in contact with one of the columns supporting an elevated railroad, under which defendant's road was operated, and was injured. In an action to recover damages the testimony was conflicting as to whether the seat plaintiff left was so crowded as to render it uncomfortable for him to remain. Defendant asked the court to charge the jury that, if they believe plaintiff left his seat unnecessarily and voluntarily, and while the car was in motion, without requesting the driver or conductor to stop the same, and when upon the step of the car he swung himself outside the line of the step of the car and, while so doing, came in contact with the column, defendant was entitled to a verdict. The court refused so to charge. *Held* error; that if, without reasonable cause, plaintiff placed himself outside of the car when in motion, he assumed the hazards of so doing. *Coleman v. Second Ave. R. R. Co.* 609

RATIFICATION.

— *What acts of principal amount to ratification of act of assumed agent. See Shaver v. Eldred.* 236

RECEIVER.

1. This action was brought by plaintiff, as receiver of an insolvent state bank, to recover the amount of certain bills of exchange alleged to have been transferred by the bank to defendant in violation of the provisions of the act of 1882 (§§ 186, 187, chap. 409, Laws of 1882), which prohibits a conveyance, assignment or transfer by a bank, not authorized by a previous resolution of its board of directors, of property exceeding in value \$1,000, except in the transaction of its ordinary business (§ 186), and also prohibits giving a preference to creditors in case of insolvency and requires the creditor so given a preference to account for the money or property received to the bank's creditors or stockholders or their trustees. The following facts appeared: On December 16, 1882, the said bank was, to the knowledge of its president and cashier, insolvent. It continued business, paying all demands until the close of business on December nineteenth, when it stopped payment. At a meeting of its directors held that evening, at which its cashier was present, it was resolved that proceedings be commenced for the appointment of a receiver. On December sixteenth the bank discounted for defendant promissory notes and gave it credit for the avails, and on December eighteenth and nineteenth it received cash deposits. At the close of business December nineteenth there was a balance of \$8,004.23 to defendant's credit. On December twentieth, about an hour before the usual time of opening the bank for business, defendant's secretary went to the bank, at the request of its cashier, and received from him six bills of exchange aggregating \$3,180.32, the largest being \$983.63, giving defendant's check for the amount, dated December nine-

teenth; the cashier entered the transaction in the books of the bank under that date. The apparent overdraft of \$79.81 defendant paid at the request of plaintiff, who was then ignorant of the above facts. Having learned of them, he made demand for the full amount of the bills. *Held*, that, as the aggregate amount of the bills transferred exceeded in value \$1,000, the transfer was prohibited, notwithstanding no one of them was of that value; that, as defendant was not a purchaser for value and the transaction was not in the usual course of business, it was illegal without regard to defendant's intent or whether it knew the bank was insolvent; also, that, although the reception of the deposits from defendant was a fraud, and as between it and the bank the latter acquired no title to them, and they might have been recovered from the bank or its receiver if they could have been identified or their avails traced, yet the transaction in question was not a restoration or restitution by the wrong-doer, but was a compensation for the fraud, which, in the case of an insolvent bank, is prohibited by statute; that the fact defendant became a creditor through the fraud of the bank officers, and, so, the bank was a trustee, *ex maleficio*, gave defendant no right to a preference over other creditors; and that the transaction between defendant and the receiver was not a settlement between the parties. *Atkinson v. Roch. Printing Co.* 168

2. After the appointment of plaintiff as receiver in supplementary proceedings against J., the latter conveyed his farm to defendant A. in consideration of an agreement by A. to cancel and discharge a debt due from J. to him, to pay all of plaintiff's claims, as receiver, and also pay and discharge certain other debts owing by J. The creditors specified assented to the arrangement. A. paid the amount due upon the judgment plaintiff then represented, together with his claims for costs and expenses, but, before he paid the other debts named, G., another creditor, obtained a judgment against J., to

which the receivership was extended. This action was thereupon brought to have the said conveyance declared fraudulent and void as to J.'s creditors. It appeared that A. had acted in good faith, without knowledge of G.'s claim, and that the price agreed to be paid was a full and adequate consideration. Held, the action was not maintainable; that by his agreement, and the adoption thereof by the creditors, whose claims he assumed, A. became legally bound as principal debtor; and as the creditor represented by plaintiff had no prior claim to defendant, but both were general creditors with equal equities, the latter was entitled to the benefit of the general rule that, when the equities are equal the legal title must prevail. *Warren v. Wilder.*

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8. A sale made by a duly appointed receiver of a state bank, pursuant to and upon terms expressed in an order of the Supreme Court, of a judgment, part of the assets of the bank, is a judicial sale, and the court may compel, by order, a specific performance of the contract of sale. *In re Denison.* 621

4. A confirmation of the contract of sale is not a requisite to its consummation, and it is not material whether the sale was public or private. *Id.*

RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

See CLAIM AND DELIVERY.

REFERENCE.

To make exceptions to a refusal of a referee to find a fact sufficient ground for a reversal, it must appear that had he found as requested the result would have been affected. *Baldwin v. Doying.* 452

REMEDIES.

1. An action at law cannot be maintained against the sureties upon

the bond of a general guardian until proceedings for an accounting have been had against the guardian and his default established therein. *Perkins v. Stimmel.* 359

2. Where evidence is received, the competency of which depends upon further evidence, upon the assurance of the party offering it that such further evidence will be supplied, in case of failure so to do the remedy is by motion to strike out the evidence received; in the absence of such a motion no question is presented for review upon appeal. *Wilson v. Kings Co. E. R. R. Co.* 487

3. In an action to recover damages for breach of warranty on sale of goods, held, that plaintiffs were not required to return the goods on discovery of the breach, but had the right to retain them and seek their remedy upon the warranty. *Argersinger v. MacNaughton.* 535

SALES.

1. T. purchased three printing presses of plaintiff under a written agreement, which provided for a settlement by notes within one year; also, that the buyer should give a policy of insurance on the purchase and security for the payment made by note, and that the title to the presses should remain in plaintiff until payment was made or security given for the deferred payment. T. did not give a policy of insurance, nor did he give any security for notes executed by him under the contract; these were renewed from time to time at his request, and before payment he made an assignment to defendant for the benefit of creditors. In an action to recover possession of the presses, held, that the giving of the notes did not operate as payment; that, under the contract, no title passed until security was given or payment made in full; and that plaintiff was entitled to recover. *C. P. P. & M. Co. v. Walker.* 7

2. Where a sale of personal property is made on condition that the

- stipulated price shall be paid on delivery, title does not pass until payment is made, unless the vendor waives the condition. *E. S. T. F. Co. v. Grant.* 40
3. Under such a contract delivery and payment are simultaneous or concurrent acts, and although the articles may have been actually delivered, the delivery is not absolute unless the vendor has, by subsequent act, waived the condition of payment. *Id.*
4. Where a contract for the sale of personal property does not provide, in express terms, that payment shall be made on delivery, or that payment and delivery shall not be concurrent the intent of the parties must control; and if from the acts of the parties and the surrounding circumstances it can be inferred that it was intended that payment and delivery should be concurrent acts, the title will be deemed to have remained in the vendor until the condition of payment is complied with. *Id.*
5. The question of intent in such case is one of fact. *Id.*
6. In an action to recover possession of personal property, it appeared that plaintiff contracted to sell to one T. the property in question, consisting of two printing presses, with the necessary shafting, together with a quantity of type and other printers' supplies, for \$1,100.95, \$500 to be paid in cash and a mortgage on the property to be given by T. for the balance. Plaintiff at once commenced to put up the shafting, set the presses and deliver the type and other materials. When the work was about half done plaintiff demanded the cash payment agreed upon. T. paid \$250 and plaintiff continued putting the presses in working order, transferring the type and other materials. Immediately after the completion of the work plaintiff's president went to T.'s office to collect the balance and there learned that T. had absconded. On the same or the next day defendant, as sheriff, levied on the goods under an attachment against T. Plaintiff's president immediately asserted to the attaching creditor that it had not parted with possession of the property, and, upon refusal to surrender it, brought this action. At the close of plaintiff's case the court directed a verdict for defendant. *Held*, error; that the question as to whether there was a delivery sufficient to pass title should have been submitted to the jury; also that by the payment of the \$250 T. did not, if title remained in plaintiff, acquire an interest to that amount, which was subject to attachment. *Id.*
7. Where a vendor of chattels is ready and offers to perform on his part and the purchaser neglects and refuses to perform, he cannot recover back the partial payments he has made. *Id.*
8. An unauthorized sale of personal property although for a valuable consideration, and to one having no notice that another is the owner, vests no higher title in the vendee than was possessed by the vendor. *Smith v. Clews.* 190
9. The firm of E. & H. executed to plaintiff H. an instrument, in form a bill of sale of all of the firm property. H. executed an instrument in return, which stated that, in consideration of the sale, he agreed to cancel an indebtedness of the firm to him, to pay certain specified debts of the firm "and such other sums for wages, merchandise recently purchased and other claims," as the firm might direct, "as entitled to a preference not exceeding \$750." Defendant, as sheriff, levied upon and took the property from the possession of plaintiff by virtue of attachments issued against the firm. In an action to recover possession defendant claimed that the transfer was, in effect, an assignment for the benefit of creditors, and was fraudulent and void upon its face because of the right reserved to the firm to direct what claims should have the preference for the purpose of the payment of the \$750. *Held*, that the contract, as evidenced by the terms of the two in-

struments, which were to be taken and construed together, did not necessarily import such an assignment, but might be construed as an absolute sale, for which the cancellation of his own debt and the agreement to pay the sums specified was the consideration; that, although the firm was insolvent, H. was at liberty to purchase the property for the purpose of obtaining payment of the debt due him; and if the sale was made absolutely and in good faith, its validity was not affected by the fact that the vendor reserved the right to direct upon what debts of theirs the \$750 surplus of consideration was to be paid; that the nature of the transaction depended upon the intent of the parties thereto, which, upon the evidence, was properly a question of fact for the jury. *Hine v. Bowe.* 350

10. The court refused a request of defendant's counsel to charge that if the firm was at the time insolvent, and by the bill of sale intended to make an assignment for the benefit of creditors, it was void. *Held*, no error, as the request did not embrace any suggestion that plaintiff H. was in any respect in privity with the firm in such intent; that this was essential, as he could not be prejudiced by an intent on their part to create a trust which the terms of the instruments did not import, unless he was in some way chargeable with participation in their intent. *Id.*

11. In September, 1883, defendant, who was the agent in New York of the firm of M., D. & Co., of Manilla, sold 4,000 bales of hemp, "to arrive," at a specified price, payable on the arrival of the hemp at New York from Manilla. The contract of sale was made by defendant in his own name, but was intended to be on account of his principals, whom he immediately notified thereof. In October of that year M., D. & Co. shipped from Manilla, by the Polynesian, 4,000 bales of hemp, deliverable to their order in New York, intending the hemp to be used in fulfillment of said contract; they indorsed, in blank, the bills of lading

therefor, which were made out to M., D. & Co., or order or assigns, and delivered them to the plaintiff to secure the payment of five bills of exchange drawn by said firm, upon which plaintiff made advances to said firm. These advances were made, without any knowledge on the part of plaintiff of said sale, by defendant. In December defendant received notice from M., D. & Co. that they had shipped the hemp by the Polynesian. In January, 1884, plaintiff, at the request of the drawees and acceptors of the bills of exchange, forwarded the bills of lading to its agent in New York, "to be delivered to defendant in exchange for his trust receipt." In February the drawers and drawees of the bills of exchange failed. In March plaintiff wrote to defendant inquiring whether the hemp on the Polynesian had been sold "to arrive." Defendant answered that it had, but soon after rescinded his "notice," so-called, that this hemp had been sold, and stating that "the sales of hemp" were made in his name and he should treat them as made for his own account. On arrival of the Polynesian plaintiff, by virtue of the bills of lading, took possession of the hemp; the price had fallen so that it could then be purchased in the New York market at much less than the contract-price. Plaintiff demanded of defendant that he should deliver the hemp under the contracts, paying over to it the proceeds, less commissions and expenses, to the extent of its advances, which defendant declined to do. Thereupon the parties agreed that defendant should receive the hemp, deliver it on the contracts, deposit a sum agreed upon as "profits," to await the determination of a litigation, pay over to plaintiff the balance, less commissions, etc.; the parties stipulating that should the court decide that defendant "had the right, as against" plaintiff, to deliver on his contracts other hemp purchased by him in these markets, judgment should be rendered in his favor for the amount so deposited. The hemp was thereupon received and delivered by defendant upon said contract; the amount

paid over to plaintiff was insufficient to pay its advances. In an action to determine the rights of the parties to the deposit, held, that, as against plaintiff, defendant had the right to deliver other hemp than that in question, and so was entitled, under the agreement, to the deposit; that, assuming the contracts of sale, although made in defendant's name, were the acts and property of his principals, plaintiff had no interest in or control over them. *H. K. and S. B. Corp. v. Cooper.* 888

12. It seems that, had the said contracts provided for a delivery of the hemp to arrive by the Polynesian, a different question would have been presented. *Id.*

13. In an action to recover for a quantity of meat alleged to have been sold between April, 1878, and April, 1880, to defendant, a married woman, the owner of a hotel, which it was alleged she carried on on her sole and separate account, it did not appear that she ever personally contracted with plaintiff for the meat, or in any manner induced him to deliver it or ever promised to pay for it; on the contrary, it appeared that plaintiff's negotiations were with defendant's husband, who did not pretend to be acting as agent, but held himself out to the public as the proprietor of the business. It was proved that defendant owned the property, which fact plaintiff knew; that she resided there with her husband and four children, and did such work about the hotel as is customary for the wife of a hotel proprietor, and that she did not lease the hotel to her husband; also, that the business cards of the house were signed by the husband as proprietor, and he assigned the guests their rooms, purchased all supplies, employed the servants, received the money due from guests and disbursed it as he saw fit. There was no evidence that defendant ever attempted to interfere with or control her husband's management of the hotel, or ever authorized him to act for her, or that she pretended at any time to be carrying on a separate business, or

that any credit was ever obtained by her husband in her name or ostensibly on her account. Held, that plaintiff was not entitled to recover; that to maintain the action it was necessary for plaintiff to show that defendant was carrying on the business on her own account and for her own benefit, and that her husband acted simply as her agent. *Dickerson v. Rogers.* 405

14. Where several distinct chattels are sold upon condition that the title shall not pass to the vendee until the agreed price is paid, and the vendor, in affirmation of the contract, seizes the chattels for the avowed purpose of selling them and collecting the amount due, he has no right to seize and sell or retain more than is sufficient to satisfy his demand and expenses. *O'Rourke v. Hadcock.* 541

15. Where an executory contract for the sale of chattels provides that the purchase price shall be paid in installments, and that title shall not pass until the price is fully paid, and the vendor permits the vendee to retain possession and make other payments, after the whole contract-price is due, he may not seize the property and terminate the contract for non-payment until he has demanded payment. *Id.*

16. Plaintiff contracted to sell to defendant a canal boat and furniture and four mules, with their harnesses, on credit, the purchase-price to be paid in installments. The contract provided that defendant was to have immediate possession, but that title to the boat should not pass until the purchase-price was paid. To secure the payment defendant executed to plaintiff a mortgage upon another canal boat. Subsequently, and after the whole purchase-price became due plaintiff took possession of the mules and advertised them for sale, together with the boat sold with its furniture; and on the same day, by separate notice, advertised the other boat for sale under and by virtue of the chattel mortgage, and then brought this action to recover pos-

session of the two boats, their furniture, etc. These were seized by the sheriff and delivered by him to plaintiff, who sold them pursuant to said advertisements. The four mules and their harnesses were worth more than the balance of the purchase price unpaid to plaintiff. *Held*, that the action of plaintiff was an election to affirm the contract and collect the amount due upon it, and that judgment was properly rendered against the plaintiff for the value of the mules, less the amount unpaid; also, for the value of the use, and damages for the detention of the two boats; also for their value in case a return could not be had. *Id.*

17. It appeared that defendant had commenced an action against plaintiff for an accounting, claiming that the purchase-price had been paid and asking that the notes given for the purchase-price, the chattel mortgage and contract be surrendered, and that defendant be restrained from selling the property described in the contract and mortgage. On trial of said action the referee found that the plaintiff was still indebted to the defendant in the sum of \$126.38, and directed a dismissal of the complaint. Judgment was entered pursuant to the report. *Held*, that the judgment roll was conclusive evidence in this action as to the amount unpaid. *Id.*

18. In an action by the vendee to recover back a payment made upon an executory contract for the sale of land, on the ground that the title was defective, it appeared that, in 1819, K. owned the premises in fee, and was in possession; he died in 1824 seized of the premises, which, by his will, he devised to his five children. Four of them deeded their interest to the fifth; the deed was recorded, and the grantee took and remained in possession until 1854, when she conveyed the premises to P., who took and remained in possession until 1884, when he conveyed them to defendant. The contract for the sale was made in March, 1885. The facts upon which the objection to the title was based were

these: In July, 1886, a bill in chancery was filed by the heirs of one McG. against the devisees of K., and on the same day a notice of the pendency of the action was also filed. The bill alleged these facts: In 1819 an executory contract for the sale of the premises by K. to McG. for \$1,200 was executed by them; \$200 was paid thereon by the vendee, who entered into possession, and, in 1820, expended \$2,000 in making improvements upon the premises. To complete the improvements McG. borrowed \$300 of K. upon an oral agreement that K. would convey the lots to McG. and receive from him a mortgage as security for the loan and the balance of the purchase-price; and to secure K. until the deed and mortgage were discharged, McG. delivered the contract to K., who never returned it and failed to convey. McG. continued in possession, paying interest on the contract until May, 1825, when he died intestate, leaving the complainants, then infants of tender years, his only heirs-at-law. Shortly thereafter defendants took and have since retained possession. The answer set up various perfect defenses. The proofs were declared closed in April, 1888. No proceedings were thereafter taken in the suit, except in May, 1844, when there was a substitution of solicitors for complainant. All of the defendants in said suit died prior to November 6, 1881, about twenty years before the trial of this action. P., then the owner, and then for the first time being advised that there was a question as to the title, made strenuous but ineffectual efforts to find the complainants in the chancery suit. It did not appear what had become of them; simply that they had not been heard of for many years, and were supposed to be dead. *Held*, that P., having purchased without actual notice of the chancery suit or the alleged claim of the complainants, acquired a perfect title, unless bound by the bill and the *lis pendens* therein; that defendant succeeded to all his rights, and a purchaser from him, although purchasing with knowledge of said claim, would acquire a perfect

title; that, assuming all the allegations of the bill were true at its date, and that they were sufficient to have entitled the complainants, at the time the bill was filed, to a judgment requiring the then owner to receive the remainder of the purchase-price, and to convey the premises, yet, that the said complainants, if living, and if dead their successors in interest, were effectually barred at the time of the execution of the contract in question from reviving and continuing said suit; and that there was no defect in defendant's title justifying plaintiff in refusing to perform.
Hayes v. Nourse. 597

— Where right to specific performance of contract for sale of land, is suspended and may be revived by tender, the tender must be absolute, not coupled with a condition.

See Cornell v. Hayden. 271

See JUDICIAL SALES.

TAX SALES.

VENDOR AND PURCHASER.

SHERIFF.

1. It seems that where the affidavit annexed to a petition for his discharge, presented by a person imprisoned upon execution, is not made on the day of the presentation of the petition, as required by the Code of Civil Procedure (§ 2201), but on a previous day, the court acquires no jurisdiction, and where an order of discharge granted thereon contains no recital of a compliance with this requirement, it is no protection to the sheriff; if, therefore, he obeys the order, he renders him liable for an escape. *Shaffer v. Rieseley.* 28

2. Where, however, the petition in such a case was duly served upon the attorney of the judgment-creditor and he, as such attorney, appeared on presentation of the petition and application for the order of discharge, without raising the objection, held, that this was a waiver thereof, and that it could not be raised thereafter in

an action against the sheriff for an escape. *Id.*

SPECIFIC PERFORMANCE.

A sale, made by a duly appointed receiver of a state bank, pursuant to and upon terms expressed in an order of the Supreme Court, of a judgment, part of the assets of the bank, is a judicial sale, and the court may compel, by order, a specific performance of the contract of sale. *In re Denison.* 621

— When right to specific performance of contract for sale of land, is suspended and may be recovered by tender, the tender must be absolute, not coupled with a condition.

See Cornell v. Hayden. 271.

SPOLIATION.

See ALTERATION.

STATE.

Prior to 1838 a dam was built across the outlet of Owasco lake, which was used for hydraulic purposes by the proprietors. In 1857 an act was passed (Chap. 527, Laws of 1857) appropriating the dam for the use of the Erie canal, subject, however, to the use for hydraulic purposes by the owners of such dam at the time of such appropriation. The canal commissioners were authorized to increase the height of the dam, and to appropriate for the purpose the necessary lands, water rights, etc. In pursuance of a resolution of the canal board, flush gates were put upon the dam by the commissioner in charge, raising the water in the lake. In 1873 plaintiff presented a claim against the state for permanent damages to his adjoining lands, and an award was made to him therefor. Under an act of 1874 (Chap. 399, Laws of 1874), the dam was rebuilt of the same height as the old one, with flush gates two feet in height taken from

the old dam and built into the new. In 1881 defendant, who was a director and the superintendent of a corporation, one of the proprietors of the dam at the time of its appropriation in 1857, acting under an authority in writing of the assistant superintendent of public works, given to him two years before, opened the gates of the dam and the water overflowed said lands of the plaintiff. Said assistant reported promptly to the superintendent the authority so given, and he had allowed it to remain in force. In an action to recover damages, held, that, assuming that the commissioners did not proceed in all things as required by statute, yet the legislature, in subsequently making appropriations and passing laws upon the subject, must be deemed to have acted with reference to what had been done by the canal authorities, and to have adopted and ratified their acts; and that, therefore, at the time in question, the state had the right to use the flush gates, and the remedy, if any, of any person whose property was injured by such act was by claim for compensation from the state; that the appointment of defendant to take charge of the gates must be deemed to have been ratified by the superintendent; also that defendant was not ineligible under the provision of the Revised Statutes (1 R. S. 250, § 185), which declares that no person owning any hydraulic works "dependent on the canals for their supply, or employed in or connected with such works, shall be employed as an agent upon the canals," as the said corporation was not dependent upon the canals, its right to the use of the water having been reserved by the act of 1857 (*supra*); that the subsequent action of the state must be presumed to have been subject to the original rights reserved; and that, therefore, the action was not maintainable. *Shaver v. Eldred.*

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STATUTES.

General provisions or the provisions of a general act do not repeal special

provisions or a special act, unless the intent to so repeal is expressed or manifested. *Weiler v. Nembach.*

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- *Chap. 863, Laws of 1873, tit. 8, § 16.*
- See People ex rel. Cooper v. Registrar of Arrears.* 19.
- *Chap. 188, Laws of 1885, §§ 7, 8, 21.*
- See People v. Briggs.* 56.
- *Chap. 410, Laws of 1882, § 440.*
- See People ex rel. Short v. Bd. of Fire Commissioners.* 67.
- *2 R. S. 189, § 6.*
- See Gall v. Gall.* 109.
- *Chap. 907, Laws of 1869.*
- See Town of Solon v. Williamsburgh Sav. Bk.* 122.
- *Chap. 400, Laws of 1882, §§ 186, 187.*
- See Atkinson v. Rochester Print. Co.* 168.
- *Chap. 547, Laws of 1874.*
- See McRickard v. Flint.* 222.
- *Chap. 527, Laws of 1857.*
- *Chap. 399, Laws of 1874.*
- *1 R. S. 250, § 185.*
- See Shaver v. Eldred.* 236.
- *Chap. 755, Laws of 1873, § 5.*
- See People ex rel. Nugent v. Board of Police Commissioners.* 245.
- *1 R. S. 732, § 147.*
- See Pearce v. Moore.* 256.
- *1 R. S. 748, § 1.*
- See Crain v. Wright.* 307.
- *1 R. S. 857, § 8.*
- See People ex rel. Myers v. Barnes* 317.
- *Chap. 399, Laws of 1884.*
- See Perkins v. Stimmel.* 359.
- *2 R. S. 692, § 8, sub. 6.*
- See Leonard v. Poole.* 371.
- *Chap. 380, Laws of 1884.*
- See Dickerson v. Rogers.* 405.
- *1 R. S. 208, § 67.*
- *Chap. 140, Laws of 1850, §§ 25, 49.*
- *Chap. 216, Laws of 1846, §§ 15, 16.*
- See Rumsey v. N. Y. & N. E. R. R. Co.* 428.
- *Chap. 482, Laws of 1873.*
- See Husner v. Brooklyn City R. R. Co.* 433.
- *Chap. 150, Laws of 1872.*
- *Chap. 429, Laws of 1875.*
- See O'Reilly v. City of Kingston.* 439.
- *Chap. 907, Laws of 1869.*
- *Chap. 925, Laws of 1871.*
- See Brownell v. Town of Greenwich,* 518.

- *Chap. 863, Laws of 1878, tit. 10, § 9.*
 — *Chap. 346, Laws of 1878.*
 — *Chap. 405, Laws of 1885, § 1.*
 — *1 R. S. 396, § 37.*
See Kane v. City of Brooklyn, 586.

STIPULATION.

1. Plaintiffs leased certain premises to S., who thereafter was adjudged a lunatic and a committee of his estate appointed. While proceedings were pending to compel the committee to pay rent the parties entered into stipulations, under and in pursuance of which part of the premises was leased to different parties. Each of the stipulations recited that the tenant named therein might occupy "for the benefit of whom it may concern," and that the assent of the parties thereto should in no respect alter their legal position toward each other; all but one provided that payment of rent by check should be deposited, and at the determination of the controversy paid "to the party held to be in possession of the said premises." It was finally adjudged in said proceedings that the lunatic himself was in possession. *Held*, that defendant, as committee, was entitled, under the stipulation, to the rent so paid in and deposited. *Otis v. Conicay.* 13

2. The other stipulation provided that the rent should be deposited "and finally paid over to the party ultimately entitled thereto." *Held*, that this referred to the final determination of the pending proceeding, and that the lunatic and his estate were entitled thereto. *Id.*

3. This action was brought to recover for goods sold. At the time of its commencement proceedings in bankruptcy were pending against the defendants. An order of arrest was issued in the action on the ground of false representations inducing the sale. After an injunction had been obtained in the bankruptcy court to restrain proceedings to collect the debt one of the de-

fendants was arrested under the order. Thereupon defendants instituted proceedings to punish plaintiffs, their attorneys, etc., for contempt. Pending these proceedings plaintiffs signed a stipulation whereby they agreed that the order of arrest should be vacated, and that no additional or further arrests should be made in the action, "or any action to collect the debt, except in bankruptcy, on their part, in respect to or upon the claim or debt, for the recovery of which the action" was brought, and that either party might enter an order *ex parte* to that effect. The defendants having been adjudicated bankrupts, set up their discharge in bar. Plaintiffs, on the trial offered evidence tending to prove that the debt in suit was fraudulently contracted. Defendants objected, producing the stipulation in support of their objection, and claiming that under it plaintiffs' proceedings were limited to the bankruptcy court, and they could proceed to judgment in the action only in case the discharge was refused. The objection was sustained. *Held*, error; that the stipulation did not deprive plaintiffs of the right to prove that their debt was not one of those from which defendants were relieved by their discharge. *Schroeder v. Frey.* 266

4. A stipulation for judgment absolute, in case of affirmance, given by defendant on appeal to this court from the General Term order of reversal, does not prevent the abatement of the action, where plaintiff dies after the appeal. *Corbett v. Twenty-third St. R. Co.* 579

STREETS.

See HIGHWAYS.

SUBMISSION OF CONTROVERSY.

The rule of pleading facts prescribed by the Code of Civil Procedure (§ 532), is applicable to the statements of facts required for the

submission of a controversy; and statements of facts, which impliedly allege jurisdiction, are sufficient as admissions that jurisdiction exists. *Brownell v. Town of Greenwich.*

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SUPPLEMENTARY PROCEEDINGS.

After the appointment of plaintiff as receiver in supplementary proceedings against J., the latter conveyed his farm to defendant A. in consideration of an agreement by A. to cancel and discharge a debt due from J. to him, pay all of plaintiff's claims, as receiver, and also pay and discharge certain other debts owing by J. The creditors specified assented to the arrangement. A paid the amount due upon the judgment plaintiff then represented, together with his claims for costs and expenses; but before he had paid the other debts named, G., another creditor, obtained a judgment against J., to which the receivership was extended. This action was thereupon brought to have the said conveyance declared fraudulent and void as to J.'s creditors. It appeared that A. had acted in good faith, without knowledge of G.'s claim, and that the price agreed to be paid was a full and adequate consideration. Held, the action was not maintainable; that by his agreement and the adoption thereof by the creditors, whose claims he assumed, A. became legally bound as principal debtor; and as the creditor represented by plaintiff had no prior claim to defendant, but both were general creditors with equal equities, the latter was entitled to the benefit of the general rule that when the equities are equal the legal title must prevail. *Warren v. Wilder.*

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TAX SALES.

The notice of a tax sale, in pursuance of which plaintiff's property was sold, was dated and first published on March fifteenth; the day of sale specified was April fourteenth. Held, that this was a compliance

with the statutory provision (§ 1, chap. 405, Laws of 1880), requiring the sale to be at a time "not less than thirty days after the first publication." *Kane v. City of Brooklyn.*

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TAXATION.

See ASSESSMENT AND TAXATION.

TENDER.

1. Defendant held a chattel mortgage, given to secure a debt payable upon demand, covering a quantity of iron ore lying upon a farm owned by E., the mortgagor. E. sold the farm and the ore to plaintiff, the deed being made "subject to the existing liens;" the latter made a tender to defendant of \$8,200 in payment and extinguishment of the lien of the mortgage. This defendant refused to accept on the ground that the amount tendered was insufficient, and thereafter entered upon the farm and sold the ore, becoming himself the purchaser. In an action for conversion it was conceded by defendant that the tender was sufficient in amount, but it was claimed that it was defective in form. Plaintiff testified, as to the tender, as follows: "I tendered and offered the money to him unconditionally and in payment and extinguishment of his lien." Held, that the tender was insufficient, as it was conditioned upon an extinguishment of the lien, which condition plaintiff had no right to attach to the acceptance; also, that, as plaintiff had not assumed payment of the debt, and took upon himself no duty or obligation in reference thereto, he could not make a legal and valid tender, as a tender before the debt was due would be ineffectual to destroy the security, and the debt only became due on demand of defendant or tender by the debtor. *Noyes v. Wyckoff.* 204
2. Where a tender is relied upon, the party pleading it must show it to have been absolute and free from all conditions. *Id.*

—When tender insufficient because coupled with a condition.
See *Cornell v. Hayden*. 271

TITLE.

1. T. purchased three printing presses of plaintiff under a written agreement, which provided for a settlement by notes within one year; also, that the buyer should give a policy of insurance on the purchase and security for the payment made by note, and that the title to the presses should remain in plaintiff until payment was made or security given for the deferred payment. T. did not give a policy of insurance, nor did he give any security for notes executed by him under the contract; these were renewed from time to time at his request, and before payment he made an assignment to defendant for the benefit of creditors. In an action to recover possession of the presses, held, that the giving of the notes did not operate as payment; that, under the contract, no title passed until security was given or payment made in full; and that plaintiff was entitled to recover. *C. P. P. & M. Co. v. Walker*. 7

2. The title to commercial paper received by a bank for collection and forwarded to its correspondent bank in the usual course of business, without any express agreement in reference thereto, does not vest in such correspondent, even if it has remitted on general account in anticipation of collections. *Nat. Park Bk. v. Seaboard Bank*. 28

3. Where a sale of personal property is made on condition that the stipulated price shall be paid on delivery, title does not pass until payment is made, unless the vendor waives the conditions. *E. S. T. F. Co. v. Grant*. 40

4. Where a contract for the sale of personal property does not provide, in express terms, that payment shall be made on delivery, or that payment and delivery shall not be

concurrent the intent of the parties must control; and if from the acts of the parties and the surrounding circumstances it can be inferred that it was intended that payment and delivery should be concurrent acts, the title will be deemed to have remained in the vendor until the condition of payment is complied with. *Id.*

5. Where one takes title to personal property simply to secure himself as surety upon a bond of his assignors, he has no interest in the property that he can sell until after a breach in the condition of the bond. His title is both personal and contingent, and by an assignment before the contingency named has happened, he parts with his security without transferring any right to his assignee. *Comley v. Dazian*. 161

6. An unauthorized sale of personal property, although for a valuable consideration, and to one having no notice that another is the owner, vests no higher title in the vendee than was possessed by the vendor. *Smith v. Clews*. 190

7. The rule that where one who has purchased real estate, with full notice of an equitable claim of another thereto, transfers it to a *bona fide* purchaser, the latter not only takes a good title, but can transfer such a title to one who purchases with full knowledge of the fact, is subject to this exception, where the transfer is back to the original purchaser, who was guilty of constructive fraud in transferring the property; if it becomes revested in him, the original equity will reattach to it in his hands. *Clark v. McNeal*. 287

TOWNS.

*See AUDITORS (TOWN).
TOWN BONDING.*

TOWN BONDING.

1. In the petition presented to the county judge in proceedings to

bond a town under the town bonding act of 1869 (Chap. 907, Laws of 1869), the petitioners described themselves as "representing a majority of the taxpayers of the town." The affidavit of verification attached to the petition stated that "the persons signing said petition are a majority of the taxpayers." In an action by the town to have bonds of the town, issued by the commissioners appointed in said proceedings, adjudged void, and that they be delivered up and canceled, *held*, that the word "representing" did not necessarily import that the majority did not themselves sign, but did it through agents representing such taxpayers; that it might be treated as having reference to the term "majority," not to the persons constituting it; and, as it appears that the word was used in various places in the act in that sense, this was a legislative interpretation of it for the purposes of the act; and so, the statement was to be considered as declaring that the subscribers were a majority of the taxpayers. *Town of Solon v. W. Sav. Bank.* 122

2. The attestation clause to each bond stated that the commissioners "have set their hands and seals" thereto. The commissioners signed as such, and opposite each was the scroll "[l. s.]" *Held*, that this could not be considered as a seal; but that the omission of a seal did not defeat the enforceable validity of the bonds; at least, that as it appeared that the commissioners intended to properly and effectually execute the bonds, and the omission was by misunderstanding, mistake or inadvertence, a court of equity might afford relief to a person justly entitled to the benefit of the instrument. *Id.*

3. Defendant was a *bona fide* purchaser for a valuable consideration of the bonds in question. When they came to its hands seals had been affixed, covering the scrolls. This it appeared had been done after they had been transferred by the railroad company, to whom they were delivered by the commissioners, and before they came

to the hands of defendant. *Held*, that, conceding the presumption was that the seals were affixed by some party interested and that the burden of proof would be upon the one seeking to enforce the bonds to explain the alteration, that rule was not applicable in an equitable action to have the security canceled because of the alteration when it appeared defendant was in no sense chargeable with *mala fides*; that the bonds were not necessarily invalidated by the addition of the seals, treating it as a material alteration, and it could not be presumed that the alteration was fraudulently made; and that upon the facts appearing it did not entitle plaintiff to the relief sought. *Id.*

4. It seems that the reference in the attestation clause to the seals, as affixed with the addition of the scroll, does not justify an inference of authority to any holder of the bonds to affix the requisite seals. *Id.*

5. After the amount of bonds authorized was issued to the president of the railroad company, he surrendered a portion of them to the commissioners, and they in place thereof delivered to him a like amount of bonds of larger denominations and made payable in a different place, of which those held by defendant are a part. The returned bonds were destroyed by the commissioners. *Held*, that, assuming the power of the commissioners to issue bonds was exhausted with the original issue, yet as they represented the town and were in some sense its agents, and as it appeared that the town had for several years paid the interest, coupons upon them, there was no equity to support an action for their cancellation against a *bona fide* holder who had purchased in reliance upon the authority with which the commissioners were lawfully clothed. *Id.*

6. In a case submitted under the Code of Civil Procedure (§ 1279) to test the validity of certain town bonds, alleged to have been issued by defendant, it was stated that proceedings were instituted under

the town bonding act of 1869 (Chap. 907, Laws of 1869), that the county judge "duly adjudged, determined and ordered" that the allegations in a petition, duly verified and presented, "are proved and substantiated;" that the petitioners represented a majority of the taxpayers and of the taxable property; that after such adjudication and order the county judge "duly appointed and commissioned" three duly qualified commissioners, who were duly sworn, and, assuming to act as officers of the town, issued bonds, purporting to be bonds of the town, which recited that they were issued by authority of said act, of which bonds those in question were a part; that said bonds were placed in the hands of one A., treasurer of the railroad, to sell and apply the proceeds to the purchase for the town of mortgage bonds of the railroad company; that this was done and the railroad used the avails in the construction of a continuation of its road, etc.; that plaintiff bought his bonds in good faith, paying par in cash. *Held*, that the admissions in the statement implied the existence of every fact essential to perfect regularity of procedure and to confer jurisdiction of the subject-matter and of the parties, including defendant; that it was, in effect, admitted that the persons appointed became commissioners of the town *de jure*, with authority to issue the bonds, and their acts, within the scope of their authority, were acts of the town; also *held*, that said commissioners could lawfully employ an agent to sell the bonds and invest the proceeds as directed. *Brownell v. Town of Greenwich.* 518

7. It was claimed by defendant that the bonds were void because made payable in twenty years instead of thirty, as required by the town bonding act. The bonds bore date May 12, 1871; those in question were less than ten per cent of the whole issue; they were purchased and delivered in July, 1871, after the passage of the act of that year (Chap. 925, Laws of 1871), amending the town bonding act by authorizing the issuing of bonds

payable at any time the commissioners may elect, less than thirty years, but requiring that not more than ten per cent of the whole issue "shall become due and payable in any one year." *Held*, that plaintiff had the right to assume that the bonds were issued under the statute as it stood at the date of delivery; that he was not bound to examine the entire series to see that no more became due in a single year than the statute permitted, and had the right to assume that defendant, through its lawfully appointed commissioners, would not do an act utterly void and so commit a fraud by taking plaintiff's money without consideration. *Id.*

8. Also, *held* (Brown, J., dissenting), that the act of 1871 applied to bonds issued after it went into effect, in pursuance of a consent of taxpayers given and adjudicated upon before that time, and as so construed said act was constitutional. *Id.*

TRADE.

1. Where a number of persons and firms have conspired together in violation of the statutes (2 R. S. 692, § 8, sub. 6; Penal Code, § 169), to do acts injurious to trade, for instance, to unlawfully advance the price of an article of food, the courts will not intervene in favor of any one of the parties to give him redress for frauds perpetrated by another to his detriment in carrying out the unlawful enterprise. *Leonard v. Poole.* 871
2. It does not affect the question that the party complained of as guilty of the fraud was acting as agent for the others. All those who knowingly promote and participate in carrying out a criminal scheme are principals, and the fact that one acts, in some respects, in subordination to the others, does not render him less a principal. *Id.*

TRESPASS.

When a mortgagee, holding a

mortgage upon several chattels, continues to sell after he has realized sufficient to pay the debt and costs, he becomes a trespasser.
O'Rourke v. Hadcock. 641

TRIAL.

1. A party has the right to impeach or discredit the testimony of his opponent; such evidence is always competent. He may also contradict a witness against him as to any matters upon which the witness has given evidence in chief, provided it is not collateral to the issue. *Ankersmit v. Tuch.* 51
2. If the testimony sought to be contradicted has reference to statements made to others, the attention of the witness should first be called to the time, place and person to whom the statement is claimed to have been made, and if denied, such person may then be called to contradict him. *Id.*
3. In an action brought by the dairy commissioner in the name of the People to recover the penalty imposed by the act of 1885 "to prevent deception in the sale of dairy products" (Chap. 183, Laws of 1885), for a violation of one of the provisions of the act (§ 7), which by the terms of the act (§ 21), does not apply "to any product manufactured or in process of manufacture at the time of the passage of this act;" it is not necessary for plaintiff to prove that the product in question was manufactured after the passage of the act; the burden is upon the defendant seeking the benefit of the exception to bring his case within it. *People v. Briggs.* 56
4. The complaint in such an action charged in one count both possession and sale of the prohibited article and violations of sections 7 and 8 of the act. At the opening of the trial defendants moved for a direction that plaintiff separate the allegations charging possession and sale so as to present them as separate and distinct causes of action, and that plaintiff be required to elect upon which one of such causes he would rely; also, to direct a separation of the cause of action based upon the provisions of section 7 from that founded on section 8. *Held,* that these motions were addressed to the discretion of the trial court, and its decision thereon was not reviewable here. *Id.*
5. The court was requested, and declined, to charge the jury that they must be satisfied beyond a reasonable doubt of the violation by defendants before they could find against them. *Held,* no error. *Id.*
6. Where a court has received improper evidence in a civil action, under objection and exception, it may remedy the error by striking out the evidence of its own motion. *Gall v. Gall.* 109
7. In an action upon a time policy of marine insurance upon a canal-boat, issued July 5, 1888, which expressly excepted "perils and losses from rottenness, inherent defects and other unseaworthiness," it appeared that the boat was repaired on August twenty-eighth, and was then in good seaworthy condition. There was no proof as to its condition after that time. It was employed in transporting coal. It left port loaded with coal on October nineteenth, and the next morning, in fair weather and smooth water, while being towed by a steam tug, suddenly sprung a leak and immediately sunk. The boat was old and subjected to heavy strains, and one of plaintiff's witnesses testified that it might be strained in loading or unloading, and that one heavy cargo might render it unseaworthy. *Held,* that plaintiffs were properly nonsuited; that it was at least incumbent upon them to show that the boat was seaworthy when she left upon her last trip. *Berwind v. Greenwich Ins. Co.* 231
8. In an action to recover damages for injuries, alleged to have been caused by defendant's negligence, these facts appeared: Plaintiff's husband leased of defendant an apartment in an apartment-house

owned by him in the city of New York. The usual mode of going to and from said apartment was by an elevator operated by defendant for the accommodation of the occupants. The door through which the elevator car was entered on the ground floor was so constructed that it could be opened by a person standing in the hallway. Plaintiff entered the hallway from the street between 6 and 7 P. M.; there was no artificial light in the hallway; as she approached the elevator the door was thrown open by a boy who, plaintiff's witnesses testified, had frequently run the elevator. She stepped through the doorway and, as the car was above, she fell to the bottom of the shaft and was injured. *Held*, that a motion for a nonsuit was properly denied; and that the evidence justified a verdict for plaintiff. *Tousey v. Roberts*. 312

9. The court after it had stated to the jury that there was no evidence that the boy was employed by defendant, charged that, although he was not a servant, it might be a question for them whether defendant should not have exercised such supervision over the building as to make it impossible for the boy to do acts from which the tenant might have derived the impression that he was such a servant. *Held*, no error. *Id.*

10. The case showed that defendant requested the court to charge six propositions set forth; it did not show what disposition was made of them. There was an exception "to each and every refusal of the court to charge each and every proposition requested by defendant's counsel." *Held*, that the exception was not available. *Id.*

11. The firm of E. & H. executed to plaintiff H. an instrument, in form a bill of sale of all of the firm property. H. executed an instrument in return, which stated that in consideration of the sale, he agreed to cancel an indebtedness of the firm to him, to pay certain specified debts of the firm "and such other sums for wages, merchandise recently purchased and

other claims," as the firm might direct, "as entitled to a preference not exceeding \$750." Defendant, as sheriff, levied upon and took the property from the possession of plaintiffs by virtue of attachments issued against the firm. In an action to recover possession defendant claimed that the transfer was, in effect, an assignment for the benefit of creditors, and was fraudulent and void upon its face because of the right reserved to the firm to direct what claims should have the preference for the purpose of the payment of the \$750. The court refused a request of defendant's counsel to charge that if the firm was at the time insolvent, and by the bill of sale intended to make an assignment for the benefit of creditors it was void. *Held*, no error, as the request did not embrace any suggestion that plaintiff H. was in any respect in privity with the firm in such intent; that this was essential, as he could not be prejudiced by an intent on their part to create a trust which the terms of the instruments did not import, unless he was in some way chargeable with participation in their intent. *Hine v. Boice*. 350

12. A trial court is not required to submit a mere abstract proposition to a jury. *Id.*

13. Defendant lawfully opened a trench in a city street parallel with the track of a street railroad company. It constructed a passageway or bridge across this trench, with uprights at each end, which supported a hand-rail on each side. The uprights nearest the track of the railroad were higher than the sills of the windows of the street cars, and were about three or four inches from the side of a passing car. Plaintiff was a passenger upon the railroad in the summer time; he was sitting at an open window of a car and had his arm broken as the car passed the bridge. In an action brought to recover damages, plaintiff claimed that the bridge was so insecurely built that one of the uprights fell upon his arm, which was at the time within the car. Defendant claimed that

the injury was caused by plaintiff's arm extending so far out of the window that it came in contact with the upright. The testimony upon this point was conflicting. It did not appear that plaintiff was warned to keep his arm inside the car, or that there was any circumstance or anything in the condition of the street which should have caused plaintiff to have anticipated danger. The court charged the jury that if plaintiff sat with his arm out of the window, and it thus came in contact with the upright and was broken, it would not defeat his right to recover unless they found that such conduct was negligent. *Held*, no error; that the question was, under the circumstances, one of fact for the jury. *Francis v. N. Y. Steam Co.*

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14. Also, *held*, that a defendant having a right to a limited use of the street was required to so exercise its right as not to unnecessarily endanger travelers; and that the question as to whether it had failed in this respect was properly submitted to the jury. *Id.*

15. Plaintiffs' complaint alleged, in substance, that they owned the fee of Third avenue in the city of B. to its center, and that defendant unlawfully operated its cars within and upon their half of the avenue. On the trial plaintiffs waived any right to recover nominal damages for trespass and claimed only to recover the damages to their premises occasioned by the nuisance, and the court, in its charge, made the right to recover dependent upon the finding of the jury that there had been a substantial injury to the premises, and that the question as to whether they were bounded by the center of the avenue had no importance. Defendant's counsel requested the court to charge that plaintiffs had no title to the fee in the avenue and that defendant had not trespassed upon their property. The court declined to charge other than as before charged. *Held*, that, as the question of title and trespass was, by the waiver of plaintiffs' counsel and the charge made, out of the

case, defendant could not have been prejudiced by the refusal. *Hussner v. Bklyn. City R. R. Co.*

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16. Where evidence is received, the competency of which depends upon further evidence, upon the assurance of the party offering it that such further evidence will be supplied, in case of failure so to do, the remedy is by motion to strike out the evidence received; in the absence of such a motion no question is presented for review upon appeal. *Wilson v. Kings Co. E. R. R. Co.*

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17. In an action to recover for work and expenses, plaintiff was permitted to put in evidence a book of memoranda made by him; this was objected to generally. *Held*, that as the memoranda might have been made competent by plaintiff's testimony verifying the entries as original and correct, and showing he was unable to recollect the items independent of the memoranda, the general objection was not well taken. *Id.*

18. The trial by jury of any questions of fact in issue in an equity action is within the discretion of the trial court. (Code of Civil Pro. § 971.) It may adopt or disregard the finding of the jury, or set aside the verdict and grant a new trial at its discretion. *Randall v. Randall*

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19. An order, therefore, setting aside the verdict and granting a new trial in such case is not appealable to this court. (§§ 190, 1347, sub. 2.) *Id.*

20. It *seems* that if the action were triable, as matter of right by a jury, as the motion for a new trial involves questions of fact which may or could have been considered by the General Term, its order would not be reviewable here. *Id.*

21. In an equity action the complaint cannot be dismissed on a trial of questions of fact by the jury. A verdict must be rendered upon all the questions submitted and the case afterwards brought to a hear-

ing before the court the same as if there had been no verdict.
MacNaughton v. Osgood. 574

22. Plaintiff, a passenger in an open car on defendant's street railroad in the city of New York, while the car was in motion, left his seat and stepped out upon the side step, and was proceeding to go forward to another seat when he came in contact with one of the columns supporting an elevated railroad, under which defendant's road was operated, and was injured. In an action to recover damages the testimony was conflicting as to whether the seat plaintiff left was so crowded as to render it uncomfortable for him to remain. Defendant asked the court to charge the jury that, if they believe plaintiff left his seat unnecessarily and voluntarily, and while the car was in motion, without requesting the driver or conductor to stop the same, and when upon the step of the car he swung himself outside the line of the step of the car and, while so doing, came in contact with the column, defendant was entitled to a verdict. The court refused so to charge. *Held,* error; that, if, without reasonable cause, plaintiff placed himself outside of the car when in motion, he assumed the hazards of so doing. *Coleman v. Second Ave. R. R. Co.* 609

—Where upon trial of action to set aside an assessment as illegal, evidence to establish a defect de hors the record not set forth in complaint is improper, and if received under that specific objection the question whether the defect so proved invalidates the assessment is not presented on appeal from judgment sustaining the assessment.
See O'Reilley v. City of Kingston. 439

—When defendant not entitled to inquire as to whether transfer to plaintiff of claim sued upon was with consideration.
See Stettheimer v. Tono. 501

—When evidence is received without objection, and no motion made to strike out, a subsequent objection and exception not available on appeal.
See Hangen v. Hachemeister. 566

UNDERTAKING.

1. In an action upon an undertaking, given on appeal from a judgment, brought by plaintiff as assignee of the judgment, the defense was that S., plaintiff's assignor, obtained the judgment as trustee of an express trust for R., and that L., the judgment-debtor, had paid the judgment to R. who acknowledged satisfaction thereof. The assignment of the judgment to plaintiff was executed and recorded prior to the alleged payment and satisfaction. Neither the defendants N. or S. had notice of the assignment at the time of payment other than that given by the assignment record. *Held,* that the defense was not available; that, as S. brought the action wherein the undertaking was given, in his own name, not as agent, the question as to his right to recover was an issuable fact, and was necessarily determined in that action, and defendants were concluded by their agreement to pay the judgment, if it was affirmed, from again bringing into question any issuable facts so determined; that conceding the judgment recovered by S. was for the benefit of R., S. was the legal owner, and although had the settlement been effected with the latter while S. was such legal owner, he would have been bound by it, yet he had the power to sell and transfer the judgment, and having done so, R.'s interest therein ceased and plaintiff, the assignee, became the legal and equitable owner, and his rights as such were not affected by the payment to R.
Seymour v. Smith. 482

2. In an action upon an undertaking alleged to have been given to secure the release of one H. from an order of arrest issued in a civil action brought in the Superior Court of the city of New York, the complaint alleged that the undertaking was executed and accepted under an agreement that, upon its execution, H. should be discharged from arrest, defendant agreeing to fully perform and abide by its terms. Said undertaking was entitled in the Supreme Court, and did not conform to the

provision of the Code of Civil Procedure (§ 575), and plaintiff claimed to recover upon it, not as a statutory undertaking, but as an agreement valid at common law. *Held*, that, treating the undertaking as an agreement, the mistake in the entitling was not available; that no particular form was necessary, nor was it necessary that it should be entitled, and so the words "Supreme Court" might be treated as surplusage; and that this action was maintainable. *Carr v. Sterling.* 558

3. The complaint in the action, in which the order of arrest was issued, demanded judgment for \$7,000 and interest. The defendant did not appear. The complaint was amended *ex parte* at Special Term so as to demand judgment for \$13,618.66, with interest. Judgment was thereafter entered for that amount. *Held*, that, conceding H. was entitled to notice of the motion to amend the complaint, the failure to give it was an irregularity merely which could be corrected on motion, but would not operate to render the judgment void; that the judgment would stand as valid until set aside or amended. *Id.*

4. The deputy sheriff testified that he arrested H.; told him the amount of bail required, and that he and H. went to see the defendant herein; that H. asked her if she would go on a bond and she replied she would; that the witness and H. then went to the house of L., the attorney in the action against H., and the bond was partially filled out; they then returned to the defendant, who signed the bond; she asked if she would be sufficient, and was told that L. said she would; that they then returned to L.'s house; he approved the bond, and thereupon H. was discharged. The defendant herein did not see plaintiff or his attorney before signing the bond. *Held*, that the evidence was sufficient to establish an agreement between defendant and plaintiff. *Id.*

5. Execution against the body of H. was not issued until a year and a

half after the return unsatisfied of the execution against his property. H. could not then be found. He had remained in the vicinity for a long time after entry of the judgment. It appeared, however, that defendant had requested plaintiff's attorney not to press or pursue H. in the matter, and he swore that this was the reason for the delay in issuing the body execution. *Held*, that any laches on the part of plaintiff was excused. *Id.*

*See APPEAL.
BONDS.*

USAGE.

1. Usage in relation to matters embraced in a contract when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, and not in contradiction of the express terms of the contract, and when it is so far established and known to the parties that it may be supposed the contract was made in reference thereto, is deemed to form part of it; and evidence is always admissible to explain the meaning usage has given to words or terms as used in a particular trade or business to enable the court to declare what the contract expressed to the parties. *Newhall v. Appleton.* 140
2. Evidence of usage is also admissible to apply a written contract to the subject-matter of the action, to explain expressions used in a particular sense by particular persons as to particular subjects, and to give effect to language in a contract as it was understood by those who made it. *Smith v. Clews.* 190

USURY.

In an action upon a promissory note the answer alleged that the note was procured to be discounted by one F. in pursuance of a corrupt and usurious agreement, whereby he received and charged a greater rate of interest than prescribed by law. Upon the trial defendants

failed to show by whom the note was discounted, or that the person so discounting it charged more than the legal rate. They proved, and requested the referee to find, that one who had previously assisted in procuring discounts of paper made and indorsed by the same parties, agreed to discount or procure the note to be discounted for five per cent of its face; that he procured the note to be discounted, and subsequently gave to the indorser, with whom he made the agreement, a check of F. for the face of the note, less five per cent, as the proceeds of the note. It appeared that F. did not discount the note. These requests were refused and exceptions taken. *Held*, that the refusals to find did not constitute error justifying a reversal of the judgment, as if the referee had found as requested, this would not have justified a determination in favor of defendants; that the burden of proof was upon them to show the usurious exaction by the party discounting the note, and such result was not accomplished by proof of a payment of a sum of money exceeding the legal rate of interest to a party undertaking for a consideration to procure the note to be discounted; that if D. acted as agent for the defendants, the plaintiff's rights could not be affected by proof of transactions between defendants and their agent; that even if it could be held in what he did D. was the agent of the parties discounting the note, to establish their defense, it was incumbent upon defendants to show that, as such agent, he took the bonus with the knowledge and consent of his principal. *Baldwin v. Doying*. 452

VENDOR AND PURCHASER.

- Where a vendor of chattels is ready and offers to perform on his part and the purchaser neglects and refuses to perform, he cannot recover back the partial payments he has made. *E. S. T. F. Co. v. Grant*.

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- Defendant contracted to purchase of F., plaintiff's assignor, five hundred hides of a quality specified, to be selected by the vendor, shipped from Chicago and delivered to defendant at Owego, upon payment of draft for the purchase-price. F. shipped the hides by one of the usual railroad routes to Owego to his own order, accompanied by a draft, with directions to deliver on payment of the draft. The hides arrived in due time and in good order, and notice thereof was given to defendant, but he refused to receive and pay for them unless he had an opportunity of taking them to his factory and there opening and examining them. Plaintiff offered to allow an examination at the railroad station, upon a platform or in the car, and notified defendant that unless accepted in accordance with the contract, the hides would be returned to the seller at Chicago and there sold and defendant charged with the difference between the contract and selling-price, together with freight and expenses, and, upon defendant's refusal of the offer the hides were reshipped and sold in accordance with the notice. In an action to recover damages for alleged breach of the contract, *held*, that the seller had the right, by shipping in his own name, to retain possession of the hides until accepted and paid for; that having made F. his agent to select, defendant was bound by the selection, and was not entitled to an examination before acceptance; that, conceding he had a right to examine the hides, the opportunity offered for so doing was just and reasonable, and he was not entitled to have them delivered into his possession for that purpose; that plaintiff was entitled, on refusal to accept, to recall the hides and sell them at Chicago pursuant to the notice; and that the difference between the contract and selling-price, with the expenses, was the proper measure of damages. *Sawyer v. Dean*. 469
- Where several distinct chattels are sold upon condition that the title shall not pass to the vendee until the agreed price is paid, and the vendor, in affirmation of the con-

tract, seizes the chattels for the avowed purpose of selling them and collecting the amount due, he has no right to seize and sell or retain more than is sufficient to satisfy his demand and expenses.
O'Rourke v. Hadcock. 541

See SALES.

WAIVER.

1. Where a general guardian of an infant brings an action in his own name as such guardian for an injury to his ward's estate, the question as to his "legal capacity" to maintain the action, if not taken by demurrer or answer, is waived. (Code of Civil Pro. § 499.) *Perkins v. Stimmel.* 359

2. Plaintiffs' complaint alleged, in substance, that they owned the fee of Third avenue in the city of B. to its center, and that defendant unlawfully operated its cars within and upon their half of the avenue. On the trial plaintiffs waived any right to recover nominal damages for trespass and claimed only to recover the damages to their premises occasioned by the nuisance, and the court, in its charge, made the right to recover dependent upon the finding of the jury that there had been a substantial injury to the premises and that the question as to whether they were bounded by the center of the avenue had no importance. Defendant's counsel requested the court to charge that plaintiffs had no title to the fee in the avenue and that defendant had not trespassed upon their property. The court declined to charge other than as before charged. Held, that, as the question of title and trespass was, by the waiver of plaintiff's counsel and the charge made, out of the case, defendant could not have been prejudiced by the refusal. *Hussner v. Brooklyn City R. R. Co.* 438

— *Where affidavit annexed to petition for discharge of one under arrest on execution is defective because not made on day of presentation, but judg-*

ment-creditor appears on presentation of petition and does not raise objection, this is a waiver and the objection may not be raised in action against sheriff for an escape.

See Shaffer v. Riceley.

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— *When contract for delivery of ice for term of years, required purchaser to pay weekly, and in case of default gave vendor the option to annul the contract, and vendor, after default, continued to deliver, but at a certain time demanded payment which purchaser refused to make except on conditions.* Held, that conceding the vendor, by continuing to deliver after default, waived the right to annul if purchaser on demand paid or offered to pay unconditionally, the latter having failed so to do, would not claim a right to a further performance by the vendor. *See Winchell v. Scott (Mem).* 640.

Id.

WARRANTY.

1. In an action to recover damages for an alleged breach of warranty, it appeared that defendant, a commission merchant, as such, sold to plaintiffs a quantity of antelope skins, with a warranty as to quality, and that there was a breach of such warranty, that plaintiffs knew defendant was acting as agent in making the sale, but defendant did not disclose to them, nor did it appear that they knew the names of the principals. It did not appear that the principals gave defendant any description of the quality or condition, or that he acted otherwise than on his own knowledge or judgment in that respect in making the sale and warranty, nor was it found that he had authority from his consignors to warrant the goods. Evidence was given by defendant that it was the custom in the trade for commission dealers not to warrant goods sold. Held, that the warranty was defendant's undertaking and he was liable for its breach; that in such case the presumption is that the responsibility is upon the person with whom the vendee deals, and he is not required to look elsewhere. *Argersinger v. MacNaughton.* 535

2. Also, *held*, that plaintiffs were not required to return the goods on discovery of the breach, but had the right to retain them and seek their remedy upon the warranty. *Id.*

WATER-COURSES.

See NAVIGATION.

WHARVES.

- The occupant or lessee of a dock or pier, to which vessels are allowed or invited to make fast for the purpose of discharging or receiving passengers or freight, is bound to keep and maintain the same in a reasonably safe condition and free from defects to those engaged or employed in carrying on such business. *Newall v. Bartlett.* 399

WILLS.

1. The will of W. gave fifty acres of land to his widow "to have and to hold for her benefit and support." In an action of ejectment, brought by a grantee of the widow, *held*, that no intent to pass a less estate than a fee could "be necessarily implied in the terms" of the devise; and that the widow took a fee under the provision of the Revised Statutes (I R. S. 748, § 1), providing that the term "heirs," or other words of inheritance, shall not be requisite to convey a fee, and that a devise will pass all the estate of the testator "unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied." *Crain v. Wright.* 307

2. The will of H. gave legacies of \$50 to each of his three sons, and directed his residuary estate to be equally divided between his six children. The will contained this clause: "Whatever obligations shall be found that I hold against my sons for whatever I have let them have heretofore shall be con-

sidered as my property and shall be considered as their legacy, in whole or in part, as the case may be." At the time of the making of the will the testator was worth \$10,000 over all liabilities; he held notes at that time and at the time of his death against defendant, one of his sons, to the amount of \$900, by their terms payable with interest. Defendant's distributive share of the residuary estate was less than the amount of the notes. In an action upon the notes, *held*, that it was not the intent of the testator to treat the notes as a gift or advancement, but his design was that they should be treated as a legacy to an amount equal to the legatee's share in the estate and as a debt for the residue. *Ritch v. Hawkhurst.* 512

3. When the language of a provision of a will is plain and free from ambiguity, effect must be given it in accordance with its terms. When it is equivocal the intention of the testator must be sought for by reference to all the provisions of the will and to such circumstances as may properly be entitled to consideration. *Id.*
4. In such case there is no inflexible rule of interpretation to govern the determination of that inquiry, but when the intention is ascertained the language and mode of expression may be subordinated to such intention. *Id.*

WORK AND LABOR.

1. Plaintiff, who was an expert in railroad building, at the request of S., who assumed to be defendant's chief engineer, and, under an arrangement between him, S. and two attorneys, who assumed to act as defendant's counsel, to the effect that plaintiff should have the contract for building defendant's road, devoted his time for about nine months and expended moneys for traveling expenses, for plans and specifications and other necessary expenses, preparatory to making the contract and doing the work. Plaintiff made and submitted to

one of the attorneys his proposal to construct and equip the road. A proposed contract was drawn up, but plaintiff was informed by one of the attorneys it was deemed advisable to have the contract made by defendant with one D., and by the latter assigned to plaintiff, to which the latter assented. Up to this time S. and the attorneys had not been formally employed by defendant, although their names appeared as holding the positions designated in a printed circular containing the names of the officers and directors of the company, and they were apparently treated as such officers. At a meeting of its board of directors thereafter, S. was appointed engineer, and the firm, in which one of said attorneys was a partner, was appointed as attorneys and counsel. At the same meeting a statement was made by a committee, to whom the matter had been submitted, setting forth, in substance, the negotiations with plaintiff, the proposed contract with D., and transfer thereof to plaintiff, drafts of which were submitted. The board assented to and approved the same, and agreed that, upon execution of

the proposed agreement between plaintiff and D., the former should be accepted and recognized as fully subrogated to the rights and substituted as to the liabilities of D. under his contract, and defendant's officers were authorized to execute the contract on its part. Plaintiff was, however, without fault on his part, denied the contract, although able and willing to perform it. In an action to recover for plaintiff's services and expenses, *held*, that by the action of defendants' board of directors the negotiations with plaintiff might be deemed to have been recognized, and, in some sense, treated as having been made on behalf of defendant; that plaintiff had a right to assume that the persons with whom he negotiated legitimately represented defendant; that this, together with the fact that the moneys expended, were for the benefit of defendant, justified a finding of an agreement between plaintiff and defendant that he should have the contract and that the services were rendered and expenses incurred at the request of defendant, and that such findings were sufficient to sustain a recovery. *Wilson v. Kings Co. E. R. R. Co.* 487

